113-322

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE ILLINOIS PNEUMATIC GAS COMPANY,
Appellant,

vs. No. 143.

JOSEPH H. BERRY AND THOMAS BERRY,
Appellees.

Brief for Appellants.

WALTER H. SMITH,
C. W. HOLCOMB,
Solicitors for Appellants.

R. O. POLKINHORN & SON, PRINTERS.

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vs.

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No. 143.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

CASE STATED.

March 4, 1869, the legislature of Illinois passed the following act. Record, pages 129, 130.

An act to incorporate the Illinois Pneumatic Company.

SECTION 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, That Timothy Wright, James M. Stryker, Chas. W. Drew, and James J. Pettit, their associates, and successors, be, and they are hereby created a body corporate and politic, with perpetual succession by the name and style of the Illinois Pneumatic Gas Company, and that by that name they and their successors shall be capable in law, of contracting and being contracted with, and of suing and being sued, in all matters whatsoever, with full power to acquire, hold, occupy, enjoy, sell, convey, and incumber all such real and personal estate as may be necessary and proper for the construction, extension,

and usefulness of the works of said company, and for the management and good government of the same, and the successful and convenient transaction of its business, and shall have all other powers incident to corporations of like nature.

SECTION 2. The said corporation shall have a common seal, which it may alter or renew at pleasure.

SECTION 3. The corporation hereby created shall have full power and authority to manufacture and sell illuminating gas, to be made from petroleum or its products under the patents owned or to be owned by said company, or in which it may have any title or interest, and issued or to be issued to A. C. Rand; also, under the aforesaid to manufacture and sell the works and machinery with all needed materials and appliances for such manufacture; and also make assignments and grant licenses under any such patents in the same manner and to the same effect as if the said corporations were a natural person.

SECTION 4. The corporation may make by-laws as it may deem necessary for the management of the affairs thereof, and (in) consistent with the laws of Illinois or the United States.

SECTION 5. The capital stock of said corporation shall be five hundred thousand dollars, and shall consist of five thousand shares of one hundred dollars each, to be subscribed for and paid in such manner and upon such terms and conditions as shall be prescribed in and by the by-laws aforesaid.

SECTION 6. Nothing herein contained shall be construed to authorize said corporation to exercise banking privileges, or to hold real estate in greater amount or value than fifty thousand dollars at any one time.

This act shall not be construed so as to authorize said company to lay down pipes or mains in any public streets, alley or highway.

SECTION 7. This act shall be deemed a public act, and shall take effect from and after its passage.

September 17, 1869, the incorporators met and organized their company, under the foregoing charter, adopted by-laws and elected directors. The defendant, Joseph H Berry, was one of those directors.

The stock was divided into 5,000 shares, of one hundred dollars each, of which forty-five hundred were given mainly in payment for the Rand patent and what is called the Loveless patent, and 500 were reserved for the purpose of being disposed of to raise working capital for the business. Of the 4,500 shares, 1,178 were given to the defendants—the Berry Brothers.

Business was commenced at Chicago and carried on there until the 24th of May, 1870, when one Mahlon S. Frost, who was the Treasurer and General Manager of the company, proposed to the directors that they should turn over to him all the property and franchises of the company for the period of two years from June 1, 1870; that he would conduct the business for that period at his own expense; pay the then existing liabilities of the company, and at the end of the two years, return to the company all the machinery, tools, fixtures and property received and then on hand, and would transfer to the complainant the right to manufacture gas with a certain machine, known as the Maxim Gas Machine, and the right to vend the same in the State of Illinois.

This proposition was accepted by the directors, and a written agreement executed, of which the following is a copy, Record pages, 16, 17, 18, 50, 51.

> "This agreement, made at the city of Chicago, county of Cook, and State of Illinois, this first day of June, 1870, between the Illinois Pneumatic Gas Company, party of the first part, and Mahlon S. Frost, party of the second part, witnesseth:
>
> "The party of the first part, in consideration of the understanding and agreement of the party of the second part, as hereinafter expressed, has demised and leased, and by these presents does demise and lease to the said party of the second part, the good will of the business, the business, the rights for the manufacturing gas and gas machines, the franchises, the machinery, imple-

ments, tools, and fixtures of the said party of the first part, to have and to hold unto said party of the second part, his executors, assigns, administrators, from the first day of June, 1870, and during [and] until the first day of June, 1872, being for the term of two years.

"And the said party of the first part, further in consideration aforesaid, has sold, assigned, transferred, and set over, and by these presents, does sell, assign, transfer, and set over unto said party of the second part, all the gas machinery now made and on hand, and all such machines now in process of being made, also all the stock and materials now on hand, also all the present notes, book accounts, claims, demands, and choses in action due, or to become due, of the said party of the first part, together with all incomes and collections to be derived therefrom, to have and to hold to the said party of the second part, his executors, administrators, and assigns, absolutely forever.

"And the said party of the second part is hereby authorized and empowered to demand, sue for, and collect said notes, accounts, claims, demands, and choses in action in the name of said party of the first part or otherwise, at the option of the said party of the second part, but at the cost and expense of the said party of the second part.

"And the said party of the second part, in consideration of the demising and leasing and sale of the property as aforesaid by said party of the first part to said party of the second part, does hereby covenant and agree with said party of the first part to pay all present liabilities of said party of the first part as the same shall become due and payable, and save the said party of the first part harmless therefrom, excepting, however, the amount now due from said party of the first part to the said party of the second part, which amount is to remain and continue a liability of the said party of the first part to said party of the second part, or his assigns, until the same is paid, the same as if this lease and agreement had not been made.

"And the said party of the second part further agrees that he will procure the right to vend the patented Maxim gas machine for the State of Illinois, which right the said party of the second part will trans-

fer free of charge and expense unto said party of the first part at the expiration of their lease, or as soon as he shall obtain the title to said patents.

"And the said party of the second part will return and deliver up to the said party of the first part the good will of the business and the business built up and acquired by said party of the second part during the term of this lease, the franchises, the right for manufacturing gas and gas machines, the machinery, implements, tools, and fixtures received by the said party of the second part from the said party of the first part, in as good condition as when so received, ordinary wear excepted, and will also transfer to said party of the first part the right to vend the said Maxim gas machine as above stated.

"It is hereby understood and agreed by the parties hereto that the said party of the first part shall have the right to sell any or all of the rights under any of the patents now owned by the said party of the first part for the State of Wisconsin, Iowa, and Minnesota, anything in this lease to the contrary notwithstanding; and in case such sale is made in all or any portion of said States of Wisconsin, Iowa, and Minnesota, this lease as to said territory so sold shall cease from the date of such sale.

"It is also understood and agreed that if the said party of the second part shall fail to prosecute the work under this lease with due dilligence, or fail to carry out any part of his agreement in good faith, it shall be lawful for the party of the first part, within three months from each failure and from such failure, to enter upon and take possession again of all the franchises, business, and property herein leased to said party of the second part. In witness whereof, the said parties have hereunto respectively set their hands and seals the day and year first above written.

"(S'g'd) ILL. PNEUMATIC GAS CO.

"TIMOTHY WRIGHT, *President.* [SEAL.]

"(S'g'd) WM. A. BROWN, *Secretary.* [SEAL.]

"In presence of—

"F. H. EICHBAUM."

[10-cent stamp.]

The said Frost, upon the making of said agreement, took possession of all the property and assets of the company of every character whatever, and thereupon the company suspended all business, and from that time (June 1, 1870), up to the present, has done no business whatever.

Frost remained in possession and carried on the business at Chicago, until August 1st, 1870, when he transferred, in writing, all his interest in the property acquired by said agreement, and all his interest in the agreement, to the defendants, and thereupon they took possession of all of said property, assets and business, and appropriated the same to their own use, and carried on the business at Chicago, until October 8, 1871, and soon thereafter, and about the 1st of November, 1871, they removed all of said property to Detroit, in the State of Michigan, and have since then carried on the business at said place.

About the 23rd of April, 1874, a proposition was made by the defendants to surrender the business upon certain terms and conditions, it, however, to be carried on under the supervision of the defendants. This proposition was accepted by the company, only on conditions which were never complied with, and the proposition was finally rejected. Soon thereafter, and about October 15th, 1874, a new proposition was made by the defendants to the company, the particulars of which may be found on pages 8 and 9 of the record. It contemplated a sale by the defendants to the company of all the tools, implements, machinery and machines on hand at cost, or a fair valuation, less the value of the property which was to be turned over to the complainant by the Frost agreement or lease, and a contribution by defendants of their proportion of the working capital and sum necessary to purchase said tools, machinery, machines, &c., and a provision that the business should be carried on at Detroit, and that the company should purchase the stock of the defendants at a price

therein named, and that the defendants should assign to the company all their interest in the Maxim patent in the territory owned by the company, and all their interest in the Frost lease.

This proposition was accepted by the company, and a committee appointed to have the contract drawn up and to visit Detroit and appraise the property, &c.

This committee made the inventory and reported the same to the company.

Sundry promissory notes were given to the defendants, either by the company or the stockholders, in pursuance of this agreement.

About the 15th of March, 1876, the defendants made a further proposition to the defendants, and a new agreement was made, of which the following is a copy: Record, pages 53–54.

> "This memorandum of agreement, made this fifteenth (15th) day of March, 1876, between Joseph H. Berry and Thomas Berry, of the first part, and the Illinois Pneumatic Gas Company of Chicago, of the second part, witneseth: That whereas on the 15th day of October, 1874, the said parties hereto made and entered into an agreement by which the said first parties contracted to sell to said second parties certain tools, machinery, gas machines, and materials for making gas machines, and, under certain conditions, to sell to said second parties the shares of stock owned by said first parties in the said company, and to assign to said second parties the lease of said company made to M. S. Frost, and by said Frost assigned to said first parties; and whereas the parties hereto have agreed to rescind said contract, and to make this in the plan thereof:
>
> "Now, therefore, this agreement witnesses that said first parties do hereby sell and transfer to said second parties any interest or claim remaining to them in and to the lease purchased by them of M. S. Frost, and do hereby agree to assign and transfer, upon demand, all

of the capital stock owned by the first parties in the said Illinois Pneumatic Gas Company, as appears by the books of the company or otherwise, to said second party, in consideration of two hundred and seventy-four (274) dollars in hand paid by said second party to said first parties, the receipt of which is hereby acknowledged, and in the further consideration that the said second party has this day and hereby does grant unto said first parties the unrestricted right, under all patents now owned and controlled by said second party, the same covering the States of Illinois, Michigan, Wisconsin, Iowa, and Minnesota, to manufacture gas machines at any one place, and at only one place, that said first parties may elect in the territory now owned or controlled by said second party, for the term that such patent or patents extend, with the privilege of selling and using said gas machines so manufactured in any of said territory so owned; and said parties of the first part, in further consideration of said payment and said grant as aforesaid, hereby agree to pay and deliver to each stockholder individually, as paid by him, on or before the first day of July, 1876, all monies, notes, or other securities paid or delivered to said first parties by said second party under said contract of 15th day of October, 1874, with interest on the cash payments from time of payment at the rate of eight (8) per centum per annum.

"The second party to this agreement further agrees, in consideration of the foregoing, to pay to said first parties, on demand, their proportion of any royalty that may be collected under said patents for royalty accruing during the time said first parties owned stock in the said Illinois Pneumatic Gas Company, in proportion as the stock owned by the first parties bears to the whole stock of the company; and said second party hereby releases said first parties from all claims, either equitable or otherwise, which second party has against them by virtue of any and all agreements or transactions heretofore had or made. It is further agreed, and said first parties bind themselves and their heirs or assigns, to repay, on demand, said second party any and all monies hereafter paid by said second party upon any judgments legally obtained against said second party

in suits which the first parties shall be notified and have a full opportunity to defend by reason of any machine or machines heretofore sold by said first parties. And said first and second parties hereby bind themselves to execute any and all further agreements, assignments, transfers, or deeds to the other party on demand, that may be necessary to the carrying out of this contract or for the better enjoyment of the same. In witness whereof, the two parties to the contract have hereunto subscribed their names and seals, this 24th day of June, 1876.

"JOSEPH H. BERRY, [SEAL.]
"THOMAS BERRY, [SEAL.]
"TIMOTHY WRIGHT,
"*Pres't Ills. Pneumatic Gas Co.*,
"THOS. C. DAY,
"*Sec'y Ills. Pneumatic Gas Co.*

"WILLIAM G. SMITH,
"*Witness as to the signatures of Joseph H. Berry and Thomas Berry.*

"This is the recognized seal of the Illinois Pneumatic Gas Co.

[L. S.] "THOS. C. DAY, *Secretary.*"

The bill of complaint, after reciting the above facts, charges that the aforesaid several transactions with the said Mahlon S. Frost and the defendants on the one hand, and the board of directors on the other, was a complete absorption and appropriation by said defendants of all the property and assets ever owned or possessed by the complainant, together with all its corporate franchises, privileges and patent rights, and that the said lease and contracts were utterly null and void. It alleges that the board of directors of complainant at a meeting held on the 23d of July, 1877, instructed its president to take all necessary steps to annul said lease and contracts, and secure a full accounting from said defendants for all profits derived by them from the property, business and franchises of complainant.

It charges that said lease was beyond the power of the directors to make, was *ultra vires* and null and void, and that the clause relating to the Maxim Gas Machine was beyond the powers of the directors to make.

It charges that the said Frost, in procuring said lease was acting in the interest of the said defendants and in collusion with them, and that the said defendants were the real parties in interest.

It charges that said lease was never authorized or sanctioned by the stockholders; that the defendant, Joseph H. Berry, was then a director and both defendants stockholders in complainant's company, and that it was a breach of duty on the part of the directors and the defendants to make said contract by reason of defendants being directors and stockholders as aforesaid.

It further charges, that the said contracts of October 15, 1874, and June 24, 1876, were for like reasons null and void and for the further reason that the directors had no power to buy or bargain for the stock of the said defendants. It charges that the release of defendants in said contract mentioned, was null and void for the reason that the defendants then held in their hands, unaccounted for, the sum of, at least, sixty thousand dollars, which they had derived from operations under said lease, and which belonged to complainant. It charges that the removal of said business from Chicago to Detroit was unathorized by the charter, and was wrongfully resorted to by the defendants for the purpose of spoliating complainant. It charges that on a fair accounting the defendants will be found to be indebted to complainant in at least the sum of one hundred thousand dollars.

The bill prays for an account for all materials, machines, tools, implements, property, and assetts of every description; for all profits made on the sale of all machines under the said Rand or Rand and Loveless patents; that the defendants may be held to be trustees holding said property and profits

for the complainant, and that said lease and contracts may be declared null and void, and for an injunction and for general relief.

The answer of the defendants admits that they received from complainant 1,178 shares of stock in exchange for their interest in the Rand and Loveless patents. They aver that said patents were of little or no value. They admit that the business was carried on at Chicago for a short time, under the management of said Frost. They aver that the company became embarrassed and was indebted in the sum of about $20,207.25, and thereupon

> "The said Mahlon S. Frost, being without means himself, consulted with these defendants about the affairs of said company, and these defendants agreed with said Frost that if he would take the property of the company and continue the business under his personal supervision and management, they would advance sufficient money to pay the floating indebtedness and outstanding debts of said complainant, and also enough capital to carry on the business of the complainant already obtained, and also money enough to develop and build up a business for said company. On securing said provision from these defendants, said Mahlon S. Frost, on or about the 24th day of May, 1870, made a proposition to the officers and directors of the complainant, substantially as in said complainant's bill of complaint set forth, which proposition was accepted, and on or about the 1st day of June, 1870, the board of directors of said complainant, by proper resolution, directed their president and secretary to enter into a contract, and the said complainant, by their authorized officers, did enter into an instrument in writing, being at the same time a lease and a bill of sale with said Mahlon S. Frost, and thereby agreed to and did let and lease to said Frost the good will of the business, the rights in the manufacturing of gas and gas machines, the franchises, the tools and fixtures of said complainant, to have and to hold them for the space of two years from and after the first day of June, 1870, and on the terms and conditions in said contract or

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lease expressed. And the said complainant, by its authorized officers, by the said instrument in writing, did sell, assign, transfer and set over to said Maholn S. Frost all the gas machinery then made and on hand, and all the gas machines then in process of being made; also all the stock and materials then on hand; also all the notes, book accounts, claims, demands and choses in action then due, or to become due, then belonging to complainant, together with all incomes and collections to be derived from said property, book accounts, choses in action, claims and accounts." Record, p. 22, 23.

The answer admits that the defendants took "the control and management of said property and business from the date of said contract and lease, or very soon thereafter." (Record, page 23.)

And that the said Frost, on or about the first day of August, 1870, formally assigned said lease and contract to defendants, and set over to them "what he had equitably assigned from the date of said lease and contract" (Record, p. 23), "and these defendants continued the business thereafter, as before, for their own use and benefit, and on their own private account." (Record, p. 23.)

The answer admits that the business was carried on at Chicago until October 8, 1871, the time of the great fire, and was thereafter carried on at Detroit. It admits the execution of the contract of the 15th of October, 1874, as alleged in complainant's bill, and that the business was carried on under that contract until the 15th of March, 1876, when the new contract set forth in complainant's bill was executed. They insist upon said contract as a full settlement and release of them, said defendants.

Assignment of Error.

1. The court below erred in holding that the lease to Frost was valid.

2. In holding that the contract of March 15, 1876, was valid.

3. In dismissing the bill, and rendering a decree against complainant for costs.

Argument.

This lease was invalid for several reasons:

1st. Because the directors had no power to make a sale of property which was absolutely essential to carry out the purpose for which the corporation was created;

2d. Because it was made with a director; and—

3d. Because it was *ultra vires*.

In the first place, this was something more than a lease. It was also a contract and an assignment, an absolute transfer of all the property of the corporation, except its implements, tools and fixtures. In addition to the leasing clause of "the good will of the business, the business, the rights for manufacturing the gas and gas machines, the franchises, the machinery, implements, tools and fixtures of the said party of the first part," it contained the following clause, to-wit:

> "And the said party of the first part further in consideration aforesaid, has *sold*, assigned, transferred and set over, and by these presents does *sell*, assign, transfer and set over unto the said party of the second part, all the gas machinery now made and on hand, and all such machines now in process of being made, also all the stock and materials now on hand, also all the present notes, book accounts, claims, demands, and choses in action, due or to become due, of the said party of the first part, together with all incomes and collections to be derived therefrom, to have and to hold to the said party of the second part, his executors, administrators and assigns, *absolutely forever*. (Record, p. 16.)

Here is a lease and a sale of property essential to the carrying on of the business for which the charter was granted. After the execution of this contract the company was without power to manufacture the articles for the manufacture of which it alone was created. All its machinery, "gas machinery," in the language of the contract, was disposed of unconditionally and absolutely, and all its other property was sold. It was practically dead and buried by the act of its own directors. They had no power to make such a contract.

In *Rollins* vs. *Clay*, 33 Maine, 139, Shepley, Chief Justice, said:

> "The directors of a corporation are authorized, by virtue of their office, to transact its ordinary business, unless the charter or by-laws otherwise determine. But they are not authorized, without some special authority, to make sale of that portion of its estate or property essentially necessary to be retained to enable it to transact its customary business."

In *Abbott* vs. *Hard Rubber Company*, 33 Barb., 578, it was held, in a very able and elaborate opinion, that the directors of a corporation have no power to make sale of any portion of its property, which is essential for the transaction of its customary business, unless special authority is given to them for that purpose.

Sutherland, Judge, said:

> "The directors sell in one lump, not only all the stock of the corporation, manufactured and unmanufactured, but all rights of the corporation under the patent to manufacture any more, and all its property of every description, except the water power and real estate, with its machinery and fixtures in Connecticut, which they, at the same time, lease to Poppenhusen and Konig for one year; thus, by this sale, discontinuing or destroying all business of the corporation, for a term at least, and by the sale of the property rights to manufacture under the patent rights."

This case is quite similar to the one before the court and is instructive, and to it we invite the careful attention of the court.

2. This lease and contract was virtually made by the directors, with one of their own number, Joseph H. Berry.

It needs no argument or citation of authorities to show that a director of a corporation is in duty bound to look after and protect its interests, and that he cannot assume any position which makes his individual interest conflict with that of the corporation. He is, to all intents and purposes, a trustee, and like all other trustees cannot make personal gain out of the property of his *cestui que trusts*. Therefore, upon principle, he is incapable of making a lease or contract with himself; as director he must make the most favorable agreement possible for the company. As an individual he is sure to make the most profitable contract possible for himself. Hence, the two relations are inconsistent and antagonistic. The contract, although in the name of Frost was really made with the defendants. He was the instrument of the defendants, and they were the real parties in interest from the inception of the contract. One of them was a director and stockholder and the other a stockholder.

To establish our position that they were the real parties in interest, we have but to call attention to the admissions in their answer. They say, Record p. 22:

> "The said Mahlon S. Frost, being without means himself consulted with these defendants about the affairs of said company, and *then* defendants agreed with said Frost, that if he would take the property of the company and continue the business under his personal supervision and management, they would advance sufficient money to pay the floating indebtedness and outstanding debts of said complainant, and also enough capital to carry on the business of the complainant al-

> ready obtained, and also money enough to develop and build up a business for said company. On receiving said promise from these defendants, said Maholn S. Frost, on or about the 24th day of May, 1870, made a proposition to the officers and directors of the complainant substantially as in said complainant's bill of complaint set forth, which proposition was accepted, and on or about the 1st day of June, 1870, the board of directors" directed the execution of the lease and contract of that date.

The answer, Record p. 23, admits that the defendants took "the control and management of said property and business from the date of said contract and lease, or very soon thereafter." And that the said Frost, on or about the first day of August, 1870, formally assigned said lease and contract, and set over to them "what he had equitably assigned from the date of said lease and contract," "and these defendants continued the business thereafter, *as before*, for their own use and benefit, and on their own private account."

If further evidence is desired by the court it can be found in the testimony in the case.

James M. Stryker, who was a director in the company, testifies as follows: Record p. 70.

"Q. Now what, if anything, did the defendants, Berry Brothers, or either of them, have to do with negotiating that lease?"

"A. Well, when the thing was first broached we supposed Berry Brothers and Frost were in company; that was the supposition by myself and by the other members of the board, but it was made in the name of Frost."

"Q. Why did you suppose that Berry Brothers and Frost were in company?

"A. That was the talk by them there. We knew Mr. Frost did not have the means to go on, and Berry Brothers did, so represented.

"Q. Well, what was the understanding about the interest of Berry Brothers in the proposition to lease the franchises of the company at the time it was accepted?

"A. My understanding was that Berry Brothers were to be partners with Mr. Frost in the matter.

"Q. In the lease?

"A. In the lease; yes, sir."

Charles W. Drew, who was a director, testified as follows: Record, p. 151.

"Q. What, then, was done?

"A. * * * A meeting was called at which Mr. Berry was present; that meeting was held in the First National Bank building, I think, here in Chicago, and after the affairs of the company had been talked over, Mr. Frost took Mr. Berry one side and had a conversation with him, private conversation, and afterwards came up and made a proposition to the company to take a lease of the company for two years—I think it was two years—he to have the property of the company inventoried; he was to run it two years, and pay off all the obligations of the company."

On cross-examination he testified as follows: Record, p. 171.

"×-Q. You said they had a private conversation?

"A. They had a consultation one side of the room; yes, sir.

"×-Q. How do you know?

"A. I know it from this fact, that Mr. Frost took Mr. Berry aside and had a conversation with him in the room, and he then came back and made this proposition; and he afterwards stated to me that Mr. Berry had agreed to back him in this transaction, and that he would never have undertaken it but for that fact."

As an authority upon the point that a director cannot contract with himself, and that the intervention of a third party is of no avail, we call attention of the court to the language of Allen, Judge, in *Abbott* vs. *Hard Rubber Co.*, *supra*, in which he says:

> "No principle is better settled than that a person having a duty to perform for others cannot act in the same matter for his own benefit. A trustee cannot, directly or indirectly by himself or through the agency of another, become the purchaser of the trust estate. Neither can he purchase an interest in property, and

hold it for his own benefit, when in respect to such property he has a duty to perform, inconsistent with the character of a purchaser on his own account. *Van Epps* vs. *Van Epps*, 9 Paige, 237; *Hawley* vs. *Cramer*, 4 Cow., 717; *Slade* vs. *Van Vechten*, 11 Paige, 21; *DeCarters* vs. *Le Ray de Chaumont*, 3 Paige, 178. It requires no athority to establish the fact that the directors of the American Hard Rubber Company, could not transfer the property of the corporation directly to themselves, or to a corporation in which they were stockholders and directors. That is they could not act as buyers and sellers in the same transaction, whether they acted in their individual capacity or as the directors of the two trading corporations. (*New York Central Ins. Co.* vs. *Nat. Prot. Ins. Co.*, 20 Barb., 468.)

"This rule of restriction upon the powers of the trustee invalidates every indirect, as it does every direct transfer to himself or for his benefit; and the intervention of a third person as a means or channel, by and through whom the title is transferred from the *cestuis que trust*, and eventually vested in the trustee, will not uphold the transaction and sustain the title of the latter; courts will look through the means to the end and apply the proper remedy for the breach of trust. If the circumstances clearly show that the two transfers constitute but one transaction, they will be treated as parts of a single transaction, together perfecting a transfer from the trustee *qua* trustee to himself individually.

"When the thing transferred does not rest in the possession of the first transferrer, but is immediately by him passed over to the trustee, for his benefit, or to an association represented by him, in whole or in part, the law will hold it to be a transfer in violation of the trust. The rights of the *cestui que trust* require in such cases that the law should presume that the intermediate taker of the property was but the agent and instrument of the trustee—a means of conveyance. The contrary of the presumption ought not to be proved, or even alleged. It would be unsafe to uphold a transfer under such circumstances, for the want of express proof of the actual intent of the parties, from the facts or upon the oath, that the repurchase of the trustee was an after thought."

3. The lease was void because the directors had no power to make it. Their act was *ultra vires*.

It will be seen from the act of incorporation (Record, p. 129), that no express power is given to the corporation to make a lease. Its right therefore to make one must rest upon the doctrine that it is one of the implied powers given to a corporation. A corporation possesses those powers only which are expressly granted, and such as are necessary to carry out those that are granted. Is the execution of a lease such a necessary power?

We affirm that it is not, upon principle and authority.

In *Richardson* vs. *Sibley*, 11 Allen, 65, it was held that a street railway corporation had no power to mortgage its franchises, road or property without legislative authority. Gray, Judge, said:

> "A corporation, created for the very purpose of constructing, owning and managing a railroad for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute *or conditional*, either of the general franchise to be a corporation or of the subordinate franchise to manage and carry on its corporate business, without which its franchise to be a corporation can have little more than a nominal existence. (*Shrewsbury and Birmingham Railway* vs. *London and Northwestern Railway*, 6 H. L. Cas, 136, 137; *York and Maryland Line Railroad* vs. *Winans*, 17 How., 39; *Pierce* vs. *Emery*, 32 N. H., 504, 508; *Hall* vs. *Sullivan Railroad*, 21 Law Reporter, 140, 141; *Worcester* vs. *Western Railroad*, 4 Met., 566; *Commonwealth* vs. *Smith*, 10 Allen, 455, 456.) Such was the opinion deliberately formed and expressed by this court, in the case last cited, after able arguments in which the authorities were fully referred to; and a mortgage by a railroad corporation of its franchise railroad and all other property, made without authority of the legislature, was accordingly declared to be void."

In *Middlesex R. R.*, vs. *Boston and Chelsea, R. R.*, 115 Mass., 351, it was held that a lease of the railroad and its franchise was null and void. The court said:

> "The contracts by which the road and franchises of the defendant corporation were transferred in the first instance to the Malden and Melrose Railroad Company, and afterwards to the plaintiff corporation, were *ultra vires* and invalid. (*Richardson* vs. *Sibley*, 11 Allen, 65.) They are not merely contracts by which another party is employed to operate the road in behalf and under the direction and control of the road of the corporation owning the franchise, receiving a share of the profits as compensation. The entire control of the road, with all its franchises is transferred, the corporation owning it receiving in return only a fixed rent payable in the form of a dividend to its stockholders."

The question has been definitely settled by this court. In the case of *Thomas* vs. *Railroad Company*, 101 U. S., 71, it was held:

1. The powers of a corporation, organized under a legislative charter are only such as the statute confers, and the enumeration of them implies the exclusion of all others.

2. A lease by a railroad company of all its rolling stock and franchises, for which no authority is given in its charter, is *ultra vires* and void.

Mr. Justice MILLER, in delivering the opinion of the court, said:

> "The railroad and all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls, are for a period of twenty years leased by the company to plaintiffs, from whom, in return, it receives as rent one-half of all the gross earnings of the road. * * * The provision for the complete possession, control and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the

road and in the exercise of the franchises of the company is resumed. * * * But while we are satisfied that the contract is both technically and in its essential character a lease, we do not see that the decision of that point either way affects the question on which we are to pass. That question is, whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void. * * * We take the general doctrine to be in this country, though there may be exceptional cases, and some authorities to the contrary, that the powers of corporations, organized under legislative statutes, are such, and *such only*, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that *the enumeration of these powers implies the exclusion of all others.*"

The learned Justice, after commenting upon the English case of *East Anglian Railways Co.* vs. *The Eastern Counties Railway Co.*, 11 C. B., 775, in which the defendant had entered into a contract by which it covenanted to take a lease of several other railroads, and the contract was held to be *ultra vires*, and another English case, in which a like decision was made, proceeds to say :

"Both of these cases are cited approvingly in the opinion of Lord Cairns in the Ashbury Company, on appeal in the House of Lords. This latter case, as decided in the Exchequer Chamber (Law Rep., 224) is much relied on by counsel for plaintiffs here as showing that, though the contract may be *ultra vires* when made by the directors, it may be enforced if afterwards ratified by the shareholders, or if partly executed.

"But, in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selborn, Chelmsford, Hatherly, and O'Hagan, and the broad doctrine established that *a contract not within the scope of the powers conferred on the corporation cannot*

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be made valid by the assent of every one of the shareholders, nor can it, by any partial performance, become the foundation of a right of action.

"It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords represents the decided preponderance of authority, both in this country and in England, and *is based upon sound principle.*"

In the light of these authorities, it is clear that this lease was utterly null and void and *ultra vires*, and incapable of being made valid even by the consent of all the shareholders.

It follows, as matter of law, that these defendants, while operating under the lease, were the trustees of the corporation, holding its property in trust, and liable to account for all profits made by them while this relation existed.

That large profits were made by them, during the existence of the lease, is a conceded fact in the case. Their answer admits that their net profits from November, 1871, to February, 1874, were $42,302,65. Record, p. 52.

The evidence shows that the net profits during the term of the lease exceeded fifty thousand dollars. Record, pp. 78, 79, 154, 194, 219.

No portion of these profits has ever been paid over to the company.

They are now in the hands of the defendants, and it is the dictate of common honesty, as well as the behest of the law, that they should be accounted for.

Is there aught in the case to show that this should not be done?

It is claimed by the defendants that the agreement of March 15, 1876, releases them from all liability to complainant.

We submit that it should not be construed to have that effect.

It imposed upon the defendants only the obligation of returning the money they had received from the individual stockholders and the interest on the same, and of paying any damages that might be recovered for any defective gas machines provided they had actual notice of the suit. These gas machines were those that they had manufactured at their shop.

It provided for the sale to the company of its stock, owned by the defendants, for the sum of $274. So far as this clause is concerned the contract was void and *ultra vires*. The company had no legal power to purchase its own stock. It assigned and sold to the company the interest of the defendants in the lease. It did not bind them to return any of the property received by Frost from the company and none was returned. It did not bind them to assign the Maxim machine patent which Frost had agreed to do, and which had been represented to be of great value. It gave to the defendants the right to manufacture gas machines, at any one place, they might select, and the right to sell them in the States of Illinois, Michigan, Wisconsin, Iowa, and Minnesota. It thereby gave them the monopoly of the whole business, and in fact swallowed up and absorbed every thing in it that was of any value. It gave them the *pro rata* of any royalties that might be collected under the patents, although they had assigned their stock to the company. It purported to release them from all claims, legal and equitable, to the company. *It made no mention of, and utterly ignored, the more than fifty thousand dollars which the defendants then held in trust for the company.*

It was a most unconscionable bargain, made by one keen, sharp and unscrupulous director with his co-directors by which they were overreached and shamefully defrauded.

Can it be possible that such a transaction will be sustained in a court of equity?

It never has been done. Those courts which have held that a contract might be made with a director, have always required that it should be fair and reasonable and equitable, and above suspicion.

Mr. Justice MILLER, in delivering the opinion of the court in *Twin Lick Oil Company* vs. *Marbury*, 91 U. S., 588, said:

> "That a director of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on *slight grounds*, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. (*Koehler* vs. *Black River Falls Iron Co.*, 2 Black, 715; *Drury* vs. *Cross*, 7 Wall., 299; *Luxemburg R. R. Co.*, vs. *Macquay*, 25 Beav., 586; *The Cumberland Co.*, vs. *Sherman*, 30 Barb., 553; 16 Md., 456.) The general doctrine, however, in regard to contracts of this class, is not that they are absolutely void, but that they are *voidable at the election of the party whose interest has been so represented by the party claiming under it.* * * *
>
> "It is very true, that as a stockholder, in making a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entirety, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director, charged with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control,

> derived from the confidence reposed in him by the stockholders who appointed him their agent."

These remarks apply with peculiar force to the present case. One of these defendants was a stockholder and the other a stockholder and director.

The evidence shows that this director was the controlling power in the company, and that he secured whatever he desired. He managed the rest of the board, and always with a view to his personal interest.

We submit that his contract of release should not be upheld, and that the decree below should be reversed, the cause referred to a master to state an account, and the defendants compelled to pay over the large amount of trust funds now in their hands.

WALTER H. SMITH,
C. W. HOLCOMB,
Solicitors for Complainant.

113-322

DEFENDANTS' BRIEF.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 143.

THE ILLINOIS PNEUMATIC GAS COMPANY, APPELLANT,

vs.

JOSEPH H. BERRY AND THOMAS BERRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

ERVIN PALMER,
Counsel for Defendants.

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DEFENDANTS' BRIEF.

STATEMENT OF THE FACTS.

This action was brought in the Circuit Court of the United States for the Eastern District of Michigan, on the 29th day of September, 1877, for an accounting.

The corporate existence of the complainant fully appears, and September 17th, 1869, it had a full board of directors and officers. From that time till June 1st, 1870, it carried on the business of manufacturing and selling gas machines, when the financial affairs of the company were in a very bad shape (100–1, 151–2), judgments had been recovered against it, executions had been issued and levies made on its property. It had no money, means or credit, nor had it friends by or through whom it could raise money to extricate itself. It had virtually stopped business and was bankrupt (172, 287). Under such circumstances, the board of directors, by resolution directed the president and secretary to execute, and they did execute, to M. S. Frost, a lease of "the good will of the business, the business, the right for the manufacturing gas and gas machines, the franchise, the machinery," etc. (Bill 5, 16), for the term of two years. The defendants, under their firm name of Berry Brothers, promised Mr. Frost, that they would advance to him sufficient money to pay the company debts and carry on the business, if he would personally manage it (288–9). They immediately advanced (34, 289) $20,207.25 to Mr. Frost for that purpose, which was applied in payment of the company obligation. He very soon left the business, and defendants were obliged to take the business to save the advances then made. On the first day of August, 1870, Frost assigned the said lease or contract to defendants (284), and

they carried out its terms and conditions. They continued to manufacture and sell gas machines in Chicago till the great fire of 1871, when everything was destroyed by it (153). Soon after that the directors met and extended the Frost lease to Berry Brothers, the assignees of it, for one year (97, 153, 175), and it was consented that defendants might move the business to Detroit, and it was accordingly moved there, where they had shops, grounds, and steam power in connection with their other business, and where they could continue the business with much less outlay.

From the time Berry Brothers took the business, they not only advanced said money to pay the corporation debts, as provided in the Frost lease, but they put into the business all the capital that could be used to advantage, at times amounting to more than $50,000, and on an average amounting to $40,000 (295). With Berry Brothers' experience and this large amount of capital invested in the enterprise, it did not at first prove successful. They lost $15,000 before the fire (294), and they lost by it the greater part of the property Frost received from the company (290), which inventoried at about $8,163.88 (34, etc.) and of which $1,600 was to be returned to the company. A meeting of the board of directors was held in April, 1873 (307, 309), at which meeting one of the firm of Berry Brothers made a favorable statement of the business, and urged the directors to take it off their hands.

Not a member of the board of directors seemed willing to take the business from Berry Brothers, and it passed a resolution requesting them to continue the business under the Frost lease, until such times as the company should call for it (310, 393), for the reason that the company had no means to carry it forward (293).

From time to time Berry Brothers urged the company to take the business (114, 154, 176), and in April, 1874, a meeting of the directors was held (135), and they made a definite proposition to sell to the company the whole business, which should be a full settlement of all the matters of business and a release of all claims against them. This proposition the company by a resolution of its board of directors accepted (135), but for want of means and unity of action of its directors and stockholders, it was unable to comply with the terms of the contract, and the resolution accepting said proposition was rescinded (137).

At a meeting of the board of directors and stockholders held on the 13th and 15th days of October, 1874, Berry Brothers submitted another proposition to them (137, 108, 156), to sell to the company their entire stock and tools, and their interest and stock in the company, and to receive from the company in consideration therefor, "good and satisfactory paper," and a release of all claims against them, said Berry Brothers (137–8, 178, 179). This proposition was accepted by the company, and the terms of it were carried out by the contracting parties (297).

In compliance with the contract, the company continued the business in the shops of Berry Brothers till the final settlement between the parties hereto. A meeting of the stockholders of the complainant corporation was held January 3, 1876, and the number of directors having been changed from nine (130) to five (140), said stockholders elected a new board of directors and officers of the company.

On the 15th day of March, 1876, a full and final settlement was made between the complainant and the defendants, and a memorandum of said settlement was then drawn up (141) and instructions were given to have the same incorporated into a formal contract, and the president and secretary of the company were instructed by resolution of the board to execute such contract when prepared, on the part of the company. Such a contract of final settlement was prepared, and on the 24th day of October, 1876, it was duly executed by the complainant and the defendants. This contract was set forth at length in the bill of complaint (10, 11), its execution was admitted by the answer (20, etc.), and it was put in evidence (284–5).

This contract and final settlement was carried out (322). The defendants were always willing and anxious, while they had the business under the Frost lease, to turn it over to the company. There is nothing in the evidence that tends to show fraud or collusion on the part of the defendants.

The foregoing are substantially the facts as shown by the proofs in this cause. The facts are also set forth in a more condensed form by the court who heard the cause below (333–4–5).

The complainant by its bill alleges that the Frost lease and the several contracts made by the complainant with the defendants were null and void, and it prays:

1. That the defendants may account for, and pay the full value of the property turned over under the Frost lease.

2. That the defendants may account for and pay complainant for all materials received of it under any and all of the so-called agreements.

3. That defendants may be decreed to be in all matters trustees for complainant, and account to it for all profits.

4. That said contracts may be decreed to be void, and that the defendants may be enjoined, etc.

The defendants by their answer claim the benefit of a demurrer. They admit the corporate existence of complainant, the execution of the contracts of June 1, 1870, of April and October, 1874, and March, 1876. They deny all allegations of fraud and collusion, and they insist that there is no equity in the bill.

Argument for Defendants.

1. The complainant being bankrupt, it was the duty of the directors to accept the terms of the Frost lease, rather than have its affairs wound up. In such an emergency, Berry Brothers, acting in good faith, advanced money to save the company, in order that they might save the money they had already put into it at its organization. Under such circumstances, they insist it was proper and legal (289).

2. That the company, having received the consideration of the Frost lease, and the same having been fully carried out, and all the matters pertaining to it having been fully settled in the transaction of October 15, 1874 (137), is not entitled to any relief from a court of equity.

3. If the Frost lease was not *per se* illegal or *malum prohibitum*, but was *ultra vires*, the company, having neglected to condemn the

they carried out its terms and conditions. They continued to manufacture and sell gas machines in Chicago till the great fire of 1871, when everything was destroyed by it (153). Soon after that the directors met and extended the Frost lease to Berry Brothers, the assignees of it, for one year (97, 153, 175), and it was consented that defendants might move the business to Detroit, and it was accordingly moved there, where they had shops, grounds, and steam power in connection with their other business, and where they could continue the business with much less outlay.

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2. That the company, having received the consideration of the Frost lease, and the same having been fully carried out, and all the matters pertaining to it having been fully settled in the transaction of October 15, 1874 (137), is not entitled to any relief from a court of equity.

3. If the Frost lease was not *per se* illegal or *malum prohibitum*, but was *ultra vires*, the company, having neglected to condemn the

unauthorized act, and to seek judicial redress within a reasonable time, is estopped from questioning it.

4. The Frost lease, in any event, was only voidable, and not void, and it has been repeatedly ratified by the subsequent acts of the company.

5. The corporation is not in a position to ask relief of a court of equity.

6. That the other contracts of the company with defendants are valid and binding as settlements between the parties.

I.

1. The directors of complainant, acting in good faith, had the power to make the Frost lease, under the circumstances.

The charter of the company gave it the usual power incident to corporations of like nature (129–130). The by-laws also provided that the directors should have full management and control of the property and franchises of the company (130).

When the Frost lease was made the company was financially in a bad way. Judgments had been obtained against it, executions had been issued and levies had been made on its property (100-151). Its officers and stockholders had refused to advance any more money. It had no credit or means to pay its debts. In short, it was bankrupt (100–1, 151–2, 172), and had virtually stopped business (287).

Not only did the act of incorporation and by-laws give the directors of the complainant full management and control of the property and franchises, but they had the legal right, acting in good faith, to apply all the corporate assets of the company to pay its debts.

> Morawetz on Corporations, sec. 240.
> Angell & Ames on Corporations, sec. 191.
> Sheldon Hat & Blocking Co. v. Eckmeyer, etc.
> 64 Howard Pr., 467.

Berry Brothers (289) offered to advance money to Mr. Frost to pay the debts of the company, if he would take a lease of the property and franchises of the company for two years. Mr. Frost made this proposition to the directors, and they were obliged to decide whether they would permit all the interests of the stockholders to be sacrificed, and also to become personally liable for any deficiency, to the extent of the unpaid percentage on their stock, or consent to and make the lease. It was their duty to execute the lease, and under such circumstances "the act was not illegal."

The Sheldon case was cited in the court below, 56 Howard Pr., 70, and then it had only been decided in the Special Term of the Supreme Court of New York. It has been affirmed by the New York Court of Appeals since this cause was appealed to this court by an elaborate opinion, rendered by Justice Tracy. He says: "The only ground upon which it can be attacked in this court is, that the trustees had no power or authority to make such settlement or transfer of its property. It is upon this ground that the learned counsel for the plaintiff assails the judgment. He insists that the act of the trustees in voting to sell and

transfer all the property of the Sheldon Company, and thus rendering it practically impossible for it to continue the business for which it was incorporated, and inflicting upon it virtually political death, was *ultra vires*. Conceding, without deciding, this position to be well taken, we are nevertheless of the opinion that this judgment must be affirmed. The act was not illegal."

In that case the directors transferred all the property of the corporation, including its franchises, to pay its debts. In this case, when the company was bankrupt, and its business suspended, the directors leased to Mr. Frost its property, and the right to use its franchises for two years, with the prospects that the company could at the end of two years resume business free from debt.

2. There was no fraud or deceit practiced by M. S. Frost in obtaining the Frost lease, nor was there any fraud or collusion between Frost and the defendants, or either of them, in procuring the lease or the assignment of the same to the defendants.

There is nothing in the circumstances that surrounded it to show a motive for fraud or collusion, or that would tend to give the averment in the bill of fraud and collusion the least shadow of plausibility or truth.

The Frost lease was by no means a sharp bargain on the part of Frost. It was quite the contrary. The company had been recently formed, and had but little business, and its reputation was bad. It had suspended its business because it could not pay its debts. Its machinery must have been but little and crude, as is the case usually in commencing a new enterprise, and soon would have to be replaced. The stock and material for manufacturing machines had doubtless run down. The manufactured machines on hand, which constituted the bulk of the company's property, could not be sold, and would have to be remade or improved. The best accounts and claims had been collected, and the slow and worthless ones remained.

By the contract the company leased the good will of the business, the tools and implements of the shop, and granted a shop right to manufacture gas machines. The company sold the gas machines made, and then in process of construction, and the book account, claims and bills receivable, for which Frost agreed to pay the company debts and procure the right to vend the patent Maxim Gas Machine for the State of Illinois, and return the good will of the business, tools and implements, and the right under the Maxim patent, free from debt and encumbrance, at the end of two years. The company reserved the right to sell the patent for a large part of the territory owned by it, in the mean time.

Mr. Frost thereby was to advance, and did advance at once, to pay the debts of the company, the sum of $20,207.25 (34), and the property received from the company, such as it was, amounted to $8,163.88 (34–5), of which the shops, tools, and implements, amounting to $1,600, were to be, and afterwards were, returned. If a reasonable deduction for bad debts is made, the whole amount received from the company would not exceed $5,000. Thus it appears that Mr. Frost paid the company more than $15,000 for the right to manufacture and sell machines for two years. No wonder Frost left the business so soon, for he had no capital, and he quickly saw he could not carry such a

load. Nobody but men who had large interests to save would ever undertake to carry out such a contract, or assume such a business as Frost left. Surely there is nothing about the terms of the Frost lease that indicated that Frost or Berry Brothers had practiced fraud or collusion in obtaining it, but rather that they had sacrificed their own interests to save the company.

Berry Brothers were large manufacturers of varnish at Detroit, and they had plenty of business. Their pecuniary responsibility and business ability were well known, and the company doubtless would have been only too glad to have them take the business directly, on the terms of the Frost lease, and there would have been no necessity for collusion or deception if they had wanted such a lease. There were no perceptible profits in the business, but if Mr. Frost would give his personal supervision to the business they would make a large pecuniary sacrifice and advance to him the needed sum of money.

When Mr. Frost broke his promises to Berry Brothers and left the business they were obliged to take it or lose not only what they had originally put into the company, but also the money advanced to Frost. They took up the business where Frost had deserted it, and with their business tact and zeal, and the use of an unlimited amount of capital, they made it a success.

Furthermore, there is no evidence of any fraud or collusion, nor is there a shadow of bad faith or improper conduct disclosed by the evidence taken in this case, nor is there any evidence showing any bad faith or fraud on the part of Mr. Frost in all his transactions with the company, or with Berry Brothers, and especially in obtaining the Frost lease.

There being no fraud or collusion shown in making the Frost lease, and the circumstances and terms being such as to preclude any inference of fraud, it would not be invalid on that account.

3. The directors of complainant, acting in good faith, had a right to make the Frost lease, under the circumstances, to a director.

When this lease was made, Mr. Frost was manager, but if he had been a director, or if the lease had been made to Joseph H. Berry, who was one of the directors, without fraud or collusion, it would have been for the best interests of the company, and therefore legal.

It is conceded that any fraudulent disposition or appropriation of the corporate property by a director, would be void, for as such a director he is an agent and trustee of the corporation for the stockholders and creditors. Courts of equity regard with jealousy contracts between a director and the corporation, but they are not void. The utmost that can be claimed for them is that they are voidable whenever fraud is discovered. But a majority of a board of directors may bind the company in a contract with one of the directors, if it be entirely free from fraud or collusion.

Morawitz on Corporations, sec. 245, note.
Harts v. Brown, 77 Ill., 226.
U. S. Rolling Stock Co. v. Atalanta, etc., Co., 34 Ohio, 450, 465.
Mayor of Griffin v. Inman, 57 Ga., 370.

Ashhurst Appeal, 60 Pa. St., 291.
Twin Lick Oil Co. v. Marbury, 91 U. S., 589.
Darst v. Gale, 83 Ill., 136, 141.
Smith v. Skeary, 47 Conn., 47.

Many of the facts in this case are similar to the facts in the case of the Twin Lick Oil Co. v. Marbury, 91 U. S., 589. Justice Miller, in deciding that case, said: "We entertain no doubt that the defendant in this case could make a loan to the company, and as we have already said, the evidence shows it to have been an honest transaction for the benefit of the corporation and its stockholders. We think it was valid originally, whether liable to be avoided afterwards by the company or not. We think the sale was a fair one. The company was hopelessly involved, besides the debt to the defendant. The well was exhausted to all appearances. Most of the stockholders who now promote this suit refused to pay assessments on their shares, to aid the company. Nothing was left the defendant but to buy it in, as no one would bid the amount of his debt." This substantially shows the condition of the complainant at the time the Frost lease was made. It had suspended business, and was bankrupt. No one would furnish the necessary funds. At such a time the defendant offered to advance money to Mr. Frost, to pay the company's debts, if he would take it and run it for two years.

In the case of Darst v. Gale, 83 Ill., 136, Justice Scofield said: "The fact that Pulsifer was for a time one of the directors of the corporation, in the absence of evidence showing bad faith in the transaction with the company, is of no moment. He might, acting in good faith, as lawfully advance money to the corporation, upon the faith of its securities, as any one else."

The case of Harts v. Brown, 77 Ill., 226, is very much like this case. Chief Justice Walker, in delivering the opinion, said: "In this case we perceive nothing unfair. The company had expended all their means and had failed to realize their expectations and reached a point at which the company must fail, unless means could be procured to further prosecute the work, and so far as we can see, there was nothing reckless or unbusinesslike in effecting this loan (of a director) for the time, at the rate of interest or on the security given. The purchase of the property by the director was valid."

It is also claimed by the bill, "that the feature of the Frost lease relating to the Maxim Gas Machine was beyond the scope and object of the company as expressed in its charter, which was to operate under the so-called Rand patent."

This claim is without force. The charter provided that the company were to have "full power to acquire, hold, occupy, enjoy, sell, convey and incumber all such real estate and personal estate as may be necessary and proper, for the construction, extension and usefulness of the works of said company, and for the management and good government of the same, and the successful and convenient transaction of its business, and shall have all other powers incident to corporations of like nature" (129). The company was organized to make and sell gas machines. The right to vend the patented Maxim Gas Machine, the directors thought, "was necessary for the successful and convenient transaction of its business." It was in the line of the company's

business, and was a proper thing for it to deal in, and the lease surely was not illegal on account of this clause of the lease.

II.

If the directors of the company did exceed their authority in making the Frost lease, 1. It had been fully performed. 2. The company was estopped from denying it, by reason of failing to take steps to annul it within a reasonable time. 3. It has been repeatedly ratified by the acts of the company.

1. The Frost lease had been fully performed by Frost and the defendants more than four years before the commencement of this suit, and therefore the company cannot question its authority to make it.

Before the lease was made, Berry Brothers had promised Mr. Frost they would advance the money to pay the company's debts. This was June 1, 1870, and before the lease was assigned to them, August 1, 1870, they had advanced to Frost and he had paid on the indebtedness of the company about $20,000 (290).

It is a well settled rule of law that the plea of *ultra vires* shall not prevail, when, instead of advancing justice, it will accomplish a wrong. Where a corporation receives money upon the faith of its acts, and uses the same, and the contract has been fully performed, it cannot plead a want of authority to do the act, by which the money was obtained.

Darst v. Gale, 83 Ill., 136.
Oil Creek, etc., R. R. Co. v. Penn., etc., 83 Pa. St., 160.
Whitney Arms Co. v. Barlow, 63 N. Y., 62.
Ex parte Chippendale, 4 De Gex M. & G., 19.
Bradley v. Ballard, 55 Ill., 413.
West v. Madison Co., etc., 82 Ill., 205.
Thompson v. Lambert, 44 Iowa, 239.

2. If the Frost lease was not *per se* illegal or *malum prohibitum*, but was *ultra vires*, the company, having neglected to condemn the unauthorized act and to seek judicial redress within a reasonable time, is estopped from questioning it.

The Frost lease was made June 1, 1870. Its execution was authorized by resolution of the board of directors of complainant, who owned nearly three-fourths of the stock of the company, on the 24th day of May, 1870 (57–9). It will be observed that directors Stryker and Drew voted for this resolution (58), and that Dr. Miner was consulted and knew about it on the day it was passed (208), and received his pay from Berry Brothers, $1,800 paid for property before the company was formed (233), and $425.00 for rent the company owed him before the Frost lease was made (33). A little more than *seven years* after that resolution was passed, at a meeting of directors of the company composed only of Miner, Stryker and Drew, the resolution to prosecute this suit was passed (144). In the meanwhile the Frost lease had been discussed and considered many times. It was assigned to Berry Brothers August 1, 1870. October 20, 1871, six of the leading stockholders,

including the promoters of this suit, gave the defendants their written consent to have the business moved to Detroit (51–2). On the 7th and 8th days of April, 1873, the lease was discussed and extended, and Dr. Miner's right to be paid by Berry Brothers for money advanced before the Frost lease, and before the company's organization under it, was also considered (328). In March, April and October, 1874, this lease was discussed, and resolutions were passed concerning the business with Berry Brothers under it.

The conditions contained in the lease were well known by the directors and stockholders from the beginning, and Berry Brothers were permitted to advance their money to pay the indebtedness of the company, and invest large sums of money in this manufacturing enterprise, under the repeated assurances of the company that all was right and valid. After more than seven years of silence, this corporation comes into a court of equity and asks that the Frost lease be declared void, and that Berry Brothers make an accounting.

When the complainant has neglected to condemn the unauthorized action of its directors for so long a time, and has permitted Berry Brothers to be led thereby to put themselves in a position from which they cannot be taken without loss, if the act were held invalid, the company will be estopped from questioning it.

Sheldon Hat Blocking Co. v. Eckmeyer, etc., 64 Howard Pr., 473.
Boston, etc., R. R. Co. v. N. Y., etc., R. R. Co., 13 R. I., 264.
Peabody v. Flint, 6 Allen, 52.
Royal Bank of Liverpool v. Gr. Junction R. R., 125 Mass., 490.
In re Pinto Mining Co., L. R., 1 Ch. Div., Vol. 8, 273.
Brown v. County of Buena Vista, 95 U. S., 159, 160–1.
Twin Lick Oil Co. v. Marbury, 91 U. S., 591.
Kent v. Quicksilver Mining Co., 78 N. Y., 184, etc. See cases cited, 173, etc.

After a statement of facts in the Sheldon case, Judge Tracy says: "For four years they did nothing to question or repudiate the settlement made in their behalf. * * The rule is well settled that a principal, on being informed of the acts which his agent assumed to do in his interest, is bound to affirm or disaffirm within a reasonable time. The doctrine of equitable estoppel applies to members of corporations or associate bodies, as well as to persons acting in a natural capacity."

In the case of Boston, etc., v. N. Y., etc., 13 R. I., 265, Justice Stiness says: "It is admitted that they knew of the sale and the terms on which it was made. Nearly three years afterwards * * no one had made any question of the legality or validiay of that sale—that it was acquiesced in, at least by their silence, etc. We think under these circumstances the complainants are equitably estopped from claiming that the sale should be set aside."

In Peabody v. Flint, 6 Allen, 52, it was held that a delay of three years and a half by a minority of the stockholders in a railroad company to complain of a mortgage, which they claimed had been fraudulently issued, forfeited the right to equitable relief.

In the Pinto Silver Mining Co., the petitioner, after three years, claimed that there had been no legal dissolution of the company, because there had been no legal sale of the property, and that he did not know that the liquidators had departed, in the conveyance, from the terms of the vote, until just before he filed his petition. Hall, V. C., decided that as to the petitioner and others, the company was not legally dissolved, but on appeal this decision was reversed, upon the ground that the petitioner was estopped from disputing the validity of the dissolution by reason of his acquiescence for three years. Cotton, L. J., says, p. 285: "Moreover, the petitioner has substantially been aware of all that has been done; he knew that the property was to be transferred to the other company, and that a final meeting was called to consider the liquidator's account. After having thus lain by, he cannot now come to have the proceedings ripped up."

In the Twin Lick Oil Co. case, Justice Swayne says: "The option to avoid such a sale must be made in a *reasonable* time. The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction, as soon as it may be reasonably done, after the party with whom that right is optional, is aware of the fact which gives him that option, are numerous." He cites:

Badger v. Badger, 2 Wall., 87.
Hayward v. R. R. Co., 17 Wall., 78.
Marsh v. Whitman, 21 Wall., 178.
Viger v. Peck, 8 Clark & Finnely, 562.
Wentworth v. Lloyd, 32 Beav., 467.
Follansbe v. Kilbreth, 17 Ill., 522.

3. The Frost lease has been repeatedly ratified by the subsequent acts of the corporation.

The subject of ratification by laches has been discussed already, but the company, by both its directors and its stockholders, have ratified and affirmed the Frost lease and the other contracts.

a. When Mr. Frost left the business after the lease was made to him (289), Berry Brothers assumed control of it (290), and he assigned the lease to them Aug. 1, 1870 (18). About Oct 20, 1871, after the great Chicago fire, the directors of complainant had a meeting, and by resolution extended the Frost lease to Berry Brothers for one year (51–2, 105, 290), and thereby ratified the lease, and the assignment of it to Berry Brothers.

b. On October 20, 1871, six of the stockholders consented to the removal of the business from Chicago to Detroit (51–2). The men who signed this paper, together with Frost and Berry Brothers, represented 3,818 shares of stock out of a total of 5,000 shares.

c. On May 7th, 1873, a meeting of the directors and stockholders of the company was held, and the Frost lease was read and discussed, and the lease and its first extension recognized, as it was stated that it would expire June 1, 1873 (328). Nothing was said about the lease being invalid, but all their acts indicated that they considered and treated it as valid.

d. At a meeting of the directors of the complainant, held April 23, 1874, Berry Brothers made a proposition to close out the deal under the Frost lease (135), and they to be released from all claims and demands the company held against them under it.

This proposition was accepted by resolution of the board (135–6), and Dr. Miner, Stryker and Drew, the men who are prosecuting this suit, voted for it. Surely this was a ratification of the lease.

e. May 5, 1884, complainant's board of directors, by resolution, appointed a committee to go to Detroit, and make an inventory of the property to be turned over to it by Berry Brothers, under the proposition accepted April 23, 1874.

f. October 15, 1874, at a meeting of the directors and stockholders of complainant Berry Brothers made another proposition to turn over the franchises and business to the company (137–8) and sell out all their shop, tools and stock, "according to terms of lease to M. S. Frost" (137), for which the individual stockholders were to become personally liable to pay their proportion to Berry Brothers, and the company was to release all claims against Berry Brothers (138). This was accepted and carried out (297). It will be observed that this was the second full settlement Berry Brothers made with the company, through the combined action of its board of directors and stockholders, of all the matters under and which pertained to the Frost lease.

The company, in accordance with the terms of this settlement, took the charge of the business and all the property purchased under it, and Berry Brothers fulfilled their part of the same. The company assumed control of the business and managed it until March, 1876 (297). This complete settlement was made of all matters pertaining to the Frost lease, five years before the commencement of this suit.

g. On the 3d day of January, 1876, a meeting of stockholders of complainant was held, and a new board of directors was elected (140), on which board the defendants were not represented. The company were in full charge of the business, and the defendants had no voice in its management.

On the 15th day of October, 1876, Berry Brothers, by request of the complainant, through the negotiations of Mr. Runnals, who had been appointed a committee for that purpose (141. 321), made a proposition to buy of the complainant the tools, stock, machines and a shop right for manufacturing machines, for which in part they were to pay back to the individuals the amounts they had paid or become obligated to pay them in the settlement of October, 1874. The proposition was accepted by resolution of the board, and its president and secretary were directed to execute a contract embodying the terms of the proposition (142–3). The contract was reduced to writing, and the bill alleges "that the president and secretary of complainant, under the direction of said board of directors, made and entered" into the contract and gives a copy of it (10, 11). One of its provisions is as follows: "And said party (the complainant) hereby releases said first parties (defendants) from all claims either equitable or otherwise which said second party has against them, by virtue of any and all agreements or transactions heretofore had or made" (284–5). This third and final settlement defendants made with complainant, in regard to any and all agreements transactions three years and a half before the the commencement of this suit.

Thus it is plain that the terms of the Frost lease have long since been fully performed.

It also appears that its terms were well known when the same was

entered into, and the company had acquiesced in them, and was estopped from questioning its validity at the time the suit was commenced, more than seven years afterwards.

It also appears that the company by the acts of its directors and stockholders, had ratified not only the Frost lease, but the other contracts complained of. Justice Tracy, in the Sheldon case above cited, further says: "If the trustees had no power as the agents of the corporation to transfer all its property, thus depriving it of its means of carrying on the business for which it was organized, it is but the case of an agent making a contract in excess of his authority. The act is voidable, not void. The principal may, nevertheless, affirm the act, and a ratification is equivalent to a prior authorization. If all the stockholders of the corporation had, with full knowledge, subsequently ratified the transfer and affirmed the settlement, the act, though beyond the power given the trustees by the charter, could not be subsequently avoided by the stockholders or by the corporation."

64 Howard Pr., 472.

Judge Folger says: "An act, though beyond the power given by the charter, unless expressly prohibited, if confirmed by the stockholders, could not be avoided by any of them to the harm of third persons." This arises from the principle that the trust for stockholders is not of a public nature."

Kent v. Quicksilver Mining Co., 78 N. Y., 186, and authorities cited in that case, pp. 173-4-5.

In the case of the Phosphate of Lime Co. v. Green et al., L. R. (7 Com. Pl.), 43, 56, Willes, J., says: "The principle by which a person on whose behalf an act is done without his authority may ratify and adopt it, is as old as any proposition known to the law."

III.

The complainant is not in a position to ask relief of a court of equity.

"In the application of the doctrine of *ultra vires*, two phases must be observed: one where the public is concerned; one where the question is between the corporate body and the stockholders in it, or between it and its stockholders, and third parties dealing with it, and through it with them. When the public is concerned to restrain a corporation within the limits of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail. When it is a question of the right of a stockholder to restrain the corporate body with its express or incidental power, the stockholder may in many cases be denied, on the ground of his *express assent*, or his intelligent, though *tacit* consent, to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust to be restrained by a *stockholder*, it is pertinent to consider what has been his conduct in regard thereto. Of course Miner, Stryker and Drew, the only promoters of this suit, having been actors as directors, in every negotiation,

resolution and contract with defendants, would be estopped as individual stockholders from claiming these contracts were illegal. What they could not do as stockholders they are seeking by this suit to accomplish through the corporate capacity of the complainant, and they alone are using the corporate name to accomplish their private purposes. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interests of the stockholder. They may be made good by the assent of the stockholder."

Kent v. Quicksilver Mining Co., 78 N. Y., 185–6.

"But the *shareholder may waive any right which is given to him for his own protection only*; and if he has either expressly or tacitly done so, he can no longer object; and neither a stranger, nor the body corporate itself, can raise such an objection to a contract made by the corporation, if no shareholders choose to raise it for themselves."

Taylor v. C. & M. Railway Co., 2 L. R. (exch.), 378.
Maunsel v. Midland etc., 1 Hemming & Miller, 160.

That doctrine has been sustained by this court in the case of Whitney v. Wyman, 101 U. S., 397. Justice Swayne says: "The corporation having assumed, by entering into the contract with the plaintiff, to have the requisite power, both parties are estopped to deny it."

When a corporation, by its directors, assumes to make a contract in which the public can have no interest or objection, and its individual stockholders make no complaint, there is no reason why it should not be estopped from denying it. This ought to be the law, and it has been declared to be the law, by the highest tribunals of this country and of England.

What has been said in relation to the Frost lease, applies with equal force to the other contracts complained of, and no further argument need be adduced concerning them.

For the foregoing reasons the defendants insist that the decree of the court below, dismissing complainant's bill, should be affirmed by this honorable court.

ERVIN PALMER,
Counsel for Defendants.

113-328

THE UNITED STATES OF AMERICA, *District of Columbia*:

To the Honorable the Supreme Court of the United States:

Petition for Writ of Habeas Corpus, &c.

Your petitioner, Benjamin F. Bigelow, being duly sworn, on his oath represents and says: That he is illegally, and without any authority of law, restrained of his liberty and confined and imprisoned in the United States jail, in said District of Columbia, by John S. Crocker, the warden of said jail; that on the 14th day of November, A. D. 1882, the jury in and for said District of Columbia presented an indictment against your petitioner to the supreme court of said District of Columbia, holding a criminal term, for the alleged crime of embezzlement charged therein to have been committed by your petitioner, of the sum of $2,189, on the 10th day of May, A. D. 1882, from the National Bank of the Republic, a body corporate, located and doing business in the city of Washington, in said District of Columbia, under and by virtue of the laws of the United States, your petitioner being then and there, as it was likewise averred in said indictment, an officer, clerk, agent, and employé of the said Bank of the Republic; that said indictment was numbered upon the records of said criminal term 14,394; that said grand jury also found and presented to said criminal term thirteen additional indictments against your petitioner for the alleged embezzlement of other sums of money from the said Bank of the Republic, whilst your petitioner bore the official relation aforesaid—said additional indictments being numbered, respectively, 14,391, 14,392, 14,393, 14,395, 14,396, 14,397, 14,398, 14,399, 14,486, 14,487, 14,488, 14,489, and 14,510, all of said indictments being for crimes and offences of the same class and character, and against your petitioner in the same capacity as in said indictment first men-

tioned and above described, and all of said indictments alleging the embezzlement of money of said Bank of the Republic; that the justice holding said criminal term, on motion of your petitioner, thereafter, to wit, at the June term, 1883, of said criminal term, lawfully ordered and directed that all of the indictments above mentioned should be consolidated together and tried as one; that subsequently, and at the term last above mentioned, to wit, on the 5th day of November, 1883, a jury was called and duly empanelled and sworn, and charged with the deliverance of your petitioner in respect to all the indictments aforesaid and consolidated together as aforesaid, your petitioner having interposed his plea of not guilty thereto.

That thereupon the United States District Attorney for said District of Columbia, on behalf of the Government of the United States, addressed said jury at length, and presented to said jury the facts that the Government expected to prove against your petitioner to sustain the charges in all and each of said indictments; that thereupon, and at the close of said address or opening of said District Attorney, the justice presiding in said criminal term directed a recess of said court to be taken, which was accordingly done; that upon the reconvening of the court said justice, without any lawful or sufficient cause existing therefor, and notwithstanding ample time existed for the trial of said indictments in their consolidated form, and without the consent of your petitioner, and against his protest, directed that said jury, so empanelled, sworn, and charged as aforesaid, should be discharged from the further consideration of said indictments, consolidated as aforesaid, and said order of consolidation, so lawfully made as aforesaid, should be ~~received~~ rescinded, which was accordingly done; that said justice alleged no reason for the said discharge of said jury and the rescinding of said order consolidating said indictments, as will appear from the record of the proceedings in said cause, hereto attached, save and excepting that it would require more time to try said

causes in their consolidated form than it would to try your petitioner under a single one of said indictments; that said justice thereupon and forthwith ordered and directed that your petitioner should again, notwithstanding his former jeopardy, and against his protest, be placed upon his trial upon one of the said indictments, and before a jury composed of the same persons as composed said first jury, that had been instructed as to the facts expected to be proved by the Government in respect to all of said indictments as aforesaid; that thereupon the said District Attorney elected to try your petitioner on said indictment numbered 14,394, and said jury was resworn to try your petitioner under said indictment last above mentioned; that thereupon your petitioner, with leave of the court first had and obtained, said order of discharge of said jury, so made as aforesaid, being without any just cause and unlawful, and said order rescinding the said order consolidating said indictments together as one being likewise without any just cause and unlawful, filed his plea of *autrefois acquit* and former jeopardy in bar of the further prosecution of your petitioner under said indictment last above mentioned; that said plea having been filed by your petitioner as aforesaid, the said District Attorney forthwith filed his demurrer on behalf of the Government thereto, which demurrer was sustained by the court, and said plea of your petitioner overruled; whereupon said trial proceeded, and a verdict of guilty rendered against your petitioner on, to wit, the 1st day of December, A. D. 1884, and your petitioner, by the judgment of said justice, sentenced to imprisonment in the prison of the State of New Hampshire for the term of five years, unlawfully, and without any authority of law, and in contravention of the Constitution and laws of the United States, as your petitioner submits.

Your petitioner further respectfully represents that he has attached hereto a duly certified copy of the said indictment numbered 14,394, as "Exhibit A," and a true and complete copy of the record of the verdict, judgment, and proceed-

ings of the court in said cause, and of all matters pertaining thereto, marked "Exhibit B," and makes the said exhibits a part of this his petition, and prays leave to refer thereto in the hearing of this petition as often as may be necessary.

Your petitioner further respectfully represents that an appeal was taken in apt time, and in due form of law prayed from said judgment to the general term of said Supreme Court of said District of Columbia to reverse said judgment, but the same has by said general term been affirmed.

Your petitioner further respectfully represents and says that the said criminal term, for the reasons aforesaid and for the causes appearing in the record aforesaid, had no jurisdiction or lawful authority to try your petitioner upon said indictment numbered 14,394; and that the discharge of the jury sworn and charged as aforesaid in the unlawful manner aforesaid was the equivalent in law of a verdict of an acquittal upon all of said indictments aforesaid, including said indictment numbered 14,394; that said trial of petitioner upon said single indictment, said jury having been unlawfully discharged as aforesaid, was in contravention of the Constitution of the United States, inasmuch as it placed your petitioner twice in jeopardy for the same offence, and said judgment and sentence of said justice was without authority of law and void, and that the attempted affirmance thereof by the said supreme court of said District sitting in general term, for the reasons aforesaid, was likewise without authority of law and void; that the said John S. Crocker, warden as aforesaid, now unlawfully and without any authority of law confines, imprisons, and restrains your petitioner of his liberty in said jail solely and only by virtue of said null and void judgment, and that said John S. Crocker, warden as aforesaid, has no other claim, warrant, process, or authority to thus unlawfully confine, imprison, and restrain your petitioner of his liberty, save and except the null and void judgment aforesaid.

Wherefore your petitioner respectfully prays and asks

that a writ of *habeas corpus* may be issued by this Honorable Court in due form of law, returnable according to law, for the purpose of hearing, examining, and determining in due form of law the matters and things alleged and contained in this petition, and that on the final hearing hereof your petitioner may be lawfully discharged from said confinement, imprisonment, and restraint, and your petitioner will ever pray; and that a writ of *certiorari* may issue to bring before this honorable court so much of said record as may be deemed necessary and requisite to learn and determine the matters and things contained in this petition.

BENJAMIN F. BIGELOW.

Sworn to before me and signed in my presence, this 17th day of January, A. D. 1885.

[SEAL.] ALDIS B. BROWNE,
Notary Public.

Endorsed: *In re* Benjamin F. Bigelow. Petition for writ of *habeas corpus*, &c.

EXHIBIT "A."

In the Supreme Court of the District of Columbia, holding a General Term. June Term, 1882.

DISTRICT OF COLUMBIA, *County of Washington*, } *ss:*

The grand jurors of the United States of America in and for the county and District aforesaid on their oath do present that Benjamin F. Bigelow, late of the county and District aforesaid, on the tenth day of May, in the year of our Lord one thousand eight hundred and eighty-two, at the county and District aforesaid, he, the said Benjamin F. Bigelow, being then and there an officer, clerk, agent, and employee in the service of The National Bank of the Republic, of Washington, D. C., a body corporate, did then and there, and while he was such officer, clerk, agent, and employee,

113-328.

113-328

Supreme Court of the United States.

EX PARTE BENJAMIN F. BIGELOW.

Petition for Writ of Habeas Corpus, &c.

BRIEF ON BEHALF OF PETITIONER.

We most respectfully submit that the writ of *habeas corpus* should be issued, for the following reasons:

1. The principal question involved has never been presented to this Court, namely, Can a justice of a circuit court of the United States discharge a jury in a criminal case, without good cause, after it has been duly empanelled, sworn, and charged with the deliverance of the prisoner, against the protest of the prisoner? In the case of the United States against Joseph Perez (9th Wheaton, p. 579), the record presented to the Supreme Court that the jury had been discharged for a sufficient cause, namely, the inability of the jury to agree.

2. It is desirable that this important question should be settled by the court of last resort and by a full consideration of the case upon its merits.

3. The authority of this Court to issue the writ upon the case presented by the petition is undoubted. In *Ex parte* Yerger (8 Wall., 85) this Court said: "We regard as established on principle and authority that the appellate jurisdiction of *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress."

embezzle and wrongfully convert to his own use, and fraudulently take, make away with, and secrete, with intent to embezzle, and fraudulently convert to his own use, and knowingly and wilfully and wrongfully dispose of a large amount of money, to wit, the sum of two thousand one hundred and eighty-nine dollars of the lawful money of the United States of America, of the value of two thousand one hundred and eighty-nine dollars of the lawful money of the said United States, belonging to the said National Bank of the Republic of Washington, a more particular description of which said money is to the grand jurors aforesaid unknown; which said money had then and there come into the possession and under the care of him, the said Benjamin F. Bigelow, by virtue of the office, clerkship, agency, and employment aforesaid of him, the said Benjamin F. Bigelow, was so employed as such officer, clerk, agent, and employee as aforesaid, against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

GEORGE B. CORKHILL,
Attorney of the United States in and for the District of Columbia.

[Endorsed:] No. 14394. United States *vs.* Benjamin F. Bigelow. Embezzlement. Witnesses: Chas. S. Bradley. A true bill. Elias S. Hutchinson, foreman. In open court. Filed Nov. 14, 1882.

A true copy of the original indictment.
Test: [SEAL.]
R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

113-328.

113-328

Supreme Court of the United States.

EX PARTE BENJAMIN F. BIGELOW.

Petition for Writ of Habeas Corpus, &c.

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2. It is desirable that this important question should be settled by the court of last resort and by a full consideration of the case upon its merits.

3. The authority of this Court to issue the writ upon the case presented by the petition is undoubted. In *Ex parte* Yerger (8 Wall., 85) this Court said: "We regard as established on principle and authority that the appellate jurisdiction of *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress."

In *Ex parte* Lauze (18 Wall., 163) Justice Miller said: "The authority of this Court in such a case, under the Constitution of the United States and the fourteenth section of judiciary act of 1879, to issue this writ, and to examine the proceedings in the inferior court, *so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer an open question.*"

In *Ex parte* Siebold (10th Otto, 371) this Court used the following expressive language: "Where personal liberty is concerned the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ."

4. We most respectfully, but earnestly, submit that to deny the writ upon the facts presented by the petition, sustained as they are by the record of the cause filed as an exhibit therewith, would vest the inferior court with a most dangerous and alarming power, and one which might in times of high political excitement be used either to oppress the innocent or to shield the guilty. It would clothe each justice of a Federal court with the authority to discharge a jury at any stage of a cause and to re-empannel another, not once, but as often as might be necessary to secure one, the members of which entertained, or were supposed to entertain, sentiments in harmony with the court's; no adequate or other cause to be assigned; no reason, good or bad, to be spread upon the record; or if assigned or spread upon the record, not reviewable upon appeal or otherwise.

WILLIAM B. WEBB, and
ROBERT CHRISTY,
Attorneys for Petitioner.

113-328

Supreme Court, District of Columbia.

GENERAL TERM.

APPEAL FROM THE CRIMINAL TERM.

Indictment No. 14394 *for Embezzlement.*

DEFENDANT'S BRIEF ON REARGUMENT.

JUDD & DETWEILER, PRINTERS.

Supreme Court, District of Columbia.

GENERAL TERM.

APPEAL FROM THE CRIMINAL TERM.

Indictment No. 14394 *for Embezzlement.*

DEFENDANT'S BRIEF ON REARGUMENT.

STATEMENT OF FACTS.

The defendant was indicted on November 14, 1882, as follows, viz:

In the Supreme Court of the District of Columbia, holding a Criminal Term. June Term, 1883.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

The grand jurors of the United States of America, in and for the county and District aforesaid, on their oath do present that Benjamin F. Bigelow, late of the county and District aforesaid, on the tenth day of May, in the year of our Lord one thousand eight hundred and eighty-two, at the county and District aforesaid, he, the said Benjamin F. Bigelow, being then and there an officer, clerk, agent, and employee in the service of the National Bank of the Republic, of Washington, a body corporate, located and doing business in the District of Columbia under and by virtue of the laws of the said United States, did then and there, and while he was such officer, clerk, agent, and employee, embezzle and wrongfully convert to his own use, and fraudulently take,

make away with, and secrete, with intent to embezzle and fraudulently convert to his own use, and knowingly and wilfully and wrongfully dispose of a large amount of money, to wit, two thousand one hundred and eighty-nine dollars, of the *lawful money of the United States of America*; of the value of two thousand one hundred and eighty-nine dollars, of the lawful money of the said United States belonging to the said National Bank of the Republic, a more particular description of which said money is to the grand jurors aforesaid unknown; which said money had then and there come into the possession and under the care of him, the said Benjamin F. Bigelow, by virtue of the office, clerkship, agency, and employment aforesaid of him, the said Benjamin F. Bigelow, and while he, the said Benjamin F. Bigelow, was so employed as such officer, clerk, agent, and employee, as aforesaid, against the form of the statute in such case made and provided, and against the peace and government of the United States of America.

GEORGE B. CORKHILL,
Attorney of the United States
in and for the District of Columbia.

[Endorsed:] No. 14391. United States *vs.* Benjamin F. Bigelow. Embezzlement. Witnesses: Chas. S. Bradley. A true bill. E. A. Hutchinson, foreman. Filed Nov. 10, 1882.

A verdict of guilty was rendered November 14, 1883, and the defendant, on December 1, 1882, sentenced to five years' imprisonment in the New Hampshire State prison. The exceptions were not entirely signed until March 13, 1884.

This was one of fourteen indictments which were found and filed against the defendant "for the same crime," viz., embezzlement. The numbers of all the indictments were as follows, viz: 14391, 14392, 14393, *14394, 14395, 14396, 14397, 14398, 14399, 14486, 14487, 14488, 14489, and 14510.

On October 18, 1883, on motion of the defendant, agreeably to a previous suggestion of the court, and on petition of the defendant, the indictments were consolidated and set down for trial on November 5, 1883. (Record, p. 2.)

On that day a jury was impaneled and sworn in all the cases, *including* No. 14394, and a FULL, PROTRACTED, AND ELABORATE OPENING made by the District Attorney of the alleged facts in all the cases. At the conclusion of this opening the court took a recess, and, on reassembling, of his own motion revoked the order of consolidation made on October 16, 1883, and not only without the consent of the defendant, but against it, directed the jury to be *resworn* and the trial to proceed in its *changed and unexpected form*. The *only* reason assigned was one of *temporary convenience*, or that it would take longer to try all the cases than one of them.

All this will more fully appear by reference to the first exception, in which will be found the following:

"After the Assistant United States District Attorney had opened the *cases* to the jury, and *stated in full* what the United States expected and proposed to prove in relation to *each and all* of said indictments, and after the court had taken a recess of half an hour and reassembled, the presiding justice stated that the opening had surprised him, and that it would TAKE A LONG TIME to try the cases; and to which the District Attorney replied, 'yes, *a month*,' and to which the attorney for the defendant replied, '*It would take no longer in one form than another*,' and *insisted* that the cases should go on and be tried on the issues as made up; and as the jury had been sworn, the court, on its own motion, ordered that the order of consolidation *should be rescinded and the jury discharged*, and that the United States should select one of the cases for trial, which, after some time, was done. The court required that the jury be resworn and the trial proceeded with, which was done, on the indictment so selected, being No. 14394."

(See Exception No. 2, record, pp. 1 and 2.)

The minutes of the court showing the proceedings chronologically will appear from the record.

(Record, pp. 2, 3, and 4.)

In addition to the matters included in the first exception, the defendant, by his attorneys, entered a plea in the nature

of *autrefois acquit*. It will be seen by reference to this plea that it contains a narrative of the proceedings of the court, and that these facts are presented "AS a plea of *autrefois acquit* and former jeopardy."

(Record, pp. 5 and 6.)

Besides, after the rendition of the verdict and within the time prescribed by the rules of court, the defendant, by his counsel, filed A MOTION IN ARREST OF JUDGMENT and for a new trial; and in that motion, among other things, presented as reasons the overruling by the court of the former jeopardy and its alleged irregular action in the discharge of the jury.

(Record, pp. 304 and (*ground No.* 46) 328.)

It is the questions arising out of these exceptions and motion that are to be discussed—the order of *reargument* being confined to these.

THE FIRST QUESTION,

Based on Exception 1 *and* 2, *and Record and Motion, Record, p.* 328.

The first and main question may be thus stated, viz: Did the discharge of the jury by the court for the reason mentioned, *i. e.*, THE LENGTH OF TIME, the trial of the cases would consume in the consolidated form, without the consent of the defendant, and, in fact, against it, place the defendant in jeopardy and operate as an acquittal, or prevent the jury from being discharged and legally resworn and a trial had on the indictment *selected* by the District Attorney, No. 14394? Or, in other words, was not the

defendant entitled to a verdict on the indictments in their consolidated form, as the jury was first sworn, of which right the action of the court could not deprive him?

1. The essential facts connected with the question are undisputed. The several indictments against the defendant had been regularly *consolidated* on the 16th of October, 1883, and remained in that condition until the 5th of November, 1883, when the order of consolidation was rescinded and the jury formally discharged, and at once resworn and respited, (Record, pp. 2, 3, and 4.) The order of consolidation had been been deliberately, and after full argument, made by the court, and the defendant had prepared his case accordingly. The jury were sworn to try the cases *as consolidated*; but, on the 5th of November, at the exclusive suggestion and order of the court, they were discharged—the United States alone consenting. At this time there had been a full and extended opening on the part of the United States, without any opportunity or permission on the part of the defendant to make a statement of his case or respond in any manner to the opening of the prosecution. *No reason was assigned for the discharge, except the length of time* which the trial of the cases would occupy in their consolidated form, which was a matter of difference of opinion, as appears from the record, between the attorneys of the United States and of the defendant, the extreme length of time being fixed by the district attorney at "a month." Moreover, the record shows that, notwithstanding the order of the court, selected matter connected with the various other indictments were allowed to be given in evidence by the United States, fully justifying the statement on the part of the defense that the cases would take no longer in one form than another. Upon the discharge of the jury it was at once re-empanelled and sworn, without any opportunity being given to challenge or

to consider what course should be taken in view of the altered condition of the cases, and the trial in its new form carried on to a verdict of guilty and sentence. The trial occupied from Monday, November 5th, to Wednesday, November 14th—eight days, excluding the intervening Saturday and Sunday, and this, too, although a large portion of evidence, not directly pertinent to the indictment which was tried, but connected with the other thirteen, was introduced.

It is thus manifest that there was *not the slightest necessity* for the sudden, unanticipated, and opposed rescission of the order of consolidation, and the discharge of the jury from *this* and the other indictments—and the immediate re-empanelling and swearing, out of which acts the verdict and sentence proceeded. Nor does the record disclose any consideration involving the "furtherance of justice" on the unusual and peculiar action of the court. And this statement conducts directly to—

ARTICLE V AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

2. Article V of amendments to the Constitution is as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces; or in the militia, when in actual service, in time of war or public danger; nor

shall any person be SUBJECT, for the same offense, to be twice put in JEOPARDY of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

(*a.*) The entire article is given. It will be seen that it occurs in connection with the "amendments," and relates to matters of the greatest personal importance to the citizen. The amendments were demanded in the early history of the nation, and regarded as indispensable. The cited article, as others, is prohibitory, and at the same time protective. It is intended to secure rights of citizens in relation to trials for alleged crimes, and to do so by preventing any invasion of those rights by a *judicial tribunal*. Indeed, it is to be distinctly observed that this amendment (and others) is confined to judicial action, and rests on the idea that such action may be oppressive—wrong, and should by constitutional enactment be prevented and rendered impossible. And these considerations should be a guide in the consideration of the terms employed.

THE CONSTITUTION CONSIDERED IN REFERENCE TO ITS TERMS.

(*b.*) Let now the pertinent part of the fifth amendment be be repeated:

"Nor shall any person be SUBJECT, for the SAME OFFENSE, to be TWICE PUT IN JEOPARDY of life and limb."

1. The first, and, in fact, *final*, constructive term is that of "*jeopardy*," connected with "*in*." The phrase is "IN JEOPARDY." By jeopardy is meant "danger"—"peril." With the word "in" united, it imports an attitude or posi-

tion of peril or danger; but not the peril itself, but a relation or condition in which that which is possible may become actual, real, fixed, determined.

2. The second term requiring consideration is "SUBJECT." It signifies "exposed to," "liable to," "to make obnoxious to," "to submit to." It does not imply consummation or possession of a matter or thing—not actual existence—but a tendency, inclination, or liability to something. Like the phrase "in jeopardy," it does not indicate the positive or absolute, but the uncertain, conditional, or possible.

3. The words "for the same offense" merely relate to identity or sameness.

4. "Twice" simply means more than once.

5. "Put" signifies the act of moving or placing a thing or person in a place or position—

Let this exposition and analysis of the operative and essential terms of the cited clause be applied.

1. And, first, they clearly indicate that they must be confined not to a completed and decided jeopardy, but to that which is future and only possible.

2. And, second, that it is this possible position or danger in which one accused of crime shall not be "put" more than once—or twice.

3. And, third, that it is THIS dual "jeopardy" which is prohibited. No judicial step shall be taken by which *actual or real* danger may be twice possible, or be in any manner liable to occur.

4. And, fourth, the prohibition is not directed against a second *verdict* of acquittal or guilt, but against actions or proceedings, "*back of these*," which might, if pursued, culminate in a verdict.

But the inhibition necessarily includes a second verdict by seizing and condemning the antecedent acts which might conduct to it.

Such seems to be a fair and correct construction of the clause or provision of the Constitution which declares: "Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb." *It rests exclusively on the words employed: their fair, proper, and true import.*

THE CONSTRUCTION SUPPORTED BY EMINENT AUTHORITIES.

But this construction is supported by eminent authority and unanswerable reasoning. In Comm. *vs.* Cook, Mr. Justice Duncan used this language, or refers to the words of the Constitution of the United States under consideration:

"It would be idle and unmeaning if it merely intended to protect the accused against a second trial; for it is a universal principle, not only in every crime, whatever be its grade, but in personal actions, and in all questions of civil rights, that a verdict and judgment is a bar to all subsequent proceedings for the same cause between the same parties or privies. To make that which was so plain and universal a rule a solemn article in a constitution; to introduce it into a bill of rights, declaring that to be one of the general, great, and essential principles of liberty and free government, unalterably established, which was the law in every, the most insignificant, offense, would be without use or meaning, and would impute to the framers of the constitution an ignorance of the law which cannot justly be ascribed to them. This is not the signification of the words used in their common use, nor in their grammatical or legal sense; twice put in jeopardy and twice put on trial, convey to the plainest understanding different ideas.

"But how is it understood by the law? What is the legal construction? Foster, the standard authority in the *Kinlock's Case*, 37, gives his opinion: 'The discharge of the jury was not to bring the prisoners' lives twice in jeopardy (which is one great inconvenience in discharging juries in capital cases), but merely to give them one chance for their lives, which it was apprehended they had lost.' But in the present case it was not to give them one chance for their lives, but obliging them to take two. One chance they had run for their lives by the first jury. This is the legal meaning, the judicial construction, of the words jeopardy of life or member; that to discharge a jury in a capital case has one great inconvenience, that of bringing the prisoner's life twice in jeopardy. * * * There is a wide difference between a verdict given and the jeopardy of a verdict. Hazard, peril, danger, jeopardy of a verdict cannot mean a verdict given. Whenever the jury are charged with a prisoner where the offense is punishable by death, and the indictment is not

defective, he is in jeopardy of his life. His life is in jeopardy on every question taken by the jury amongst themselves. While they are deliberating whether he shall live or die, can it be said that his life is not in jeopardy? His chance of life fluctuates during their deliberation, but his hopes of life are increased by the knowledge that the jury finds his case one of difficulty. He had heard the judge inform them if they doubted they must acquit. When the jury come in and asked whether they are agreed on their verdict, this is to him an awful moment. When they say they have not agreed; and they cannot agree, he is entitled to all the benefit of their doubts and difficulties, and to say to the court 'I have put myself on trial for life or death on these twelve men; I will not agree to be again put in jeopardy; I will take this chance sooner than undergo the pain and anxiety of another trial.'"

Commonwealth *v.* Cook, 9 American Decisions, pp. 481–483.

It is perhaps impossible to respond to this condensed and clear exposition of the pertinent words of the Constitution. It is not attempted in any text-book or in any judicial opinion.

THE MAXIM AND GENERAL RULE THAT NO ONE SHALL BE TWICE PLACED IN JEOPARDY FOR THE SAME MATTER.

But the correction of this exposition will appear by a reference to the pertinent maxims or rules in relation to dual trials in the earlier periods of the English law and cotemporaneous with the adoption of the amendments of the Constitution.

These first declared that "a party" should not be twice endangered "for the same matter" in life and limb; and, second, that to prevent this a jury should not be discharged without a verdict.

The first reference is to the maxim as found in Broom's Legal Maxims:

"NEMO DEBET BIS VEXARI PRO UNA ET EADEM CAUSA."
5 Rep., 61.

"*It is a rule of law that a man shall not be twice vexed for one and the same cause.*"

Broom's Legal Maxims, p. *241.

And on p. *247 it is said that the most important application of the maxim occurs in criminal law.

Hawkins, in his Pleas of the Crown, in speaking of the plea of *autrefois acquit*, says:

"The plea of *autrefois acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence more than once."

And, under the title of *autrefois convict*, he says:

"The plea of *autrefois convict* seems chiefly to depend on this reason, that the party ought not to be brought twice into danger of his life for the same crime."

Hawkins' Pleas of the Crown, 7th ed., London, 1795, vol. 4, pp. 311 and 327.

CHITTY thus states the maxim:

"The plea of *autrefois acquit*, which is a plea in bar, is founded upon the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation."

And in speaking of the plea of *autrefois convict*, he says:

"The plea of *autrefois convict* depends, like that we have just considered, on the principle that no man shall be more than once in peril for the same offence."

(Chitty's Criminal Law, 4th American ed., 1841, vol. 1, pp. 452 and 462.)

By Blackstone it is thus laid down:

"1. First, the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."

And, referring to the plea of *autrefois convict*, he says:

"And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime."

Blackstone's Commentaries, vol. 4, pp. *335 and 336.

These authorities or text-book sufficiently present the maxim or general principle by which a second trial is condemned. The form of statement differs, and it may be well to briefly consider this difference.

In the Latin maxim the words used are "that a man shall not be TWICE VEXED (*vexari*) for one and the same cause," and the term *vexari* means *disturbed, agitated*, and is in harmony with the construction of the term as heretofore presented.

The maxim itself contemplates that there shall be no vexation or disturbance of a party a second time for the same matter.

As presented by Hawkins, it does not differ essentially from the maxim itself, for he declares that the plea is grounded upon the maxim "that a man shall not be BROUGHT INTO DANGER of his life * * more than once." "BROUGHT INTO DANGER" is the phrase used.

The statement of Bacon is that of Hawkins.

The statement of Chitty is simply that the plea of *autrefois acquit* "is founded upon the principle that no man shall be PLACED IN PERIL of legal penalties more than once."

The statement of Blackstone is substantially the same as that of Hawkins, the words "BROUGHT INTO" being used in

connection with both pleas. The difference between Blackstone and the others is, that, for the first time, the word "JEOPARDY" is used.

It will thus be seen that the maxim or principle standing alone, does not permit a second trial or justify a party being placed a second time in a position of peril for the same matter; and hence supports the construction contended for by Mr. Justice Duncan, and maintained in this brief.

THE JURY NOT ALLOWED TO BE DISCHARGED IN THE EARLY PERIODS OF THE LAW WITHOUT A VERDICT.

That this was the *true* import of the maxim or principles in the earlier periods of the law, will appear by reference to the fact that a jury regularly sworn and organized could not be discharged without the rendition of a verdict. The order maintained in the citation of the maxim will be pursued in reference to this, as far as applicable.

According to COKE:

"A jury sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict."

Coke upon Littleton, 15th ed., London, 1794, vol. 2, sect. 366, p. 227 *b*.

Hawkins, under the title "Verdict," says: "First. That it seems to have been anciently an uncontroverted rule, and hath been allowed, even by those of the contrary opinion, to have been the general tradition of the law, that a jury sworn and charged in a capital case cannot be discharged (without the prisoner's consent) till they have given a verdict. And, notwithstanding some authorities to the contrary, in the reign of *King Charles the Second*, this hath been holden for clear law, both in the reign of King James the Second and since the Revolution."

Hawkins' Pleas of the Crown, vol. 4, ch. 47, sec. 1, p. 459.

And this statement of Hawkins is adopted *verbatim et literatim* by Bacon.

Bacon's Abridgment, 5th ed., London, 1798, vol. 3, title "Juries (G)," pp. 768–769.

ARCHBOLD says:

"The general rule is, that the jury must be kept together from the time they are first charged with the prisoner or defendant until they deliver their verdict, unless the prisoner consent to their being discharged."

Archbold's Criminal Procedure, Waterman's (6th) ed., vol. 1, p. *172.

And CHITTY says:

"And it is laid down to be an uncontroverted rule that a sworn and charged in a capital case cannot be discharged until they have given a verdict."

Chitty's Criminal Law, vol. 1, p. *634.

The same doctrine is set forth in Foster 16, 30, 38; and in the King *v.* Perkins, Carthen, 465, and Rex *v.* Jeffs, 2 Str., 984, and in other books and cases.

From all these citations it is manifest that the practice of keeping juries together until they agreed, or the refusal to discharge them, grew out of the maxim and general principle against dual trials, was in fact not only its inevitable sequence, but also an indisputable construction.

The latter grew out of the former. To permit the discharge was clearly regarded as antagonistic to the principle that a party should not be twice placed in danger; and this, ON PRINCIPLE, remains correct up to the present time.

THE MAXIM IN FULL FORCE; FOR CONVENIENCE THE PRACTICE TO SOME EXTENT CHANGED AS RESPECTS THE DISCHARGE OF JURORS. THIS CHANGE EXCEPTIONAL, SPECIAL, AND LIMITED.

In the progress of time it became, to a limited extent, a practice to discharge jurors; *but the general rule or principle continued in full force.* The authorities distinctly treat the discharge as exceptions and invasions of an elementary principle and of an established maxim.

This is particularly referred to in Hale's Pleas of the Crown:

"By the ancient law, if the jury sworn had been once particularly charged with a prisoner, as before is showed, it was commonly held they must give up their verdict, and they could not be discharged before their verdict was given up, and so is my Lord Coke (P. C., cap. 47, p. 110); and this is the reason given (22 E., 3 Coron., 449) why, after the plea of *not guilty* and the inquest charged, the prisoner cannot become an approver, because the inquest shall not be discharged. But the book at large, viz., 21 E., 3, 18*a*, mentions not the charging of the inquest, but the plea of *not guilty* and the jury at the bar. (Co. Lit., 227*b*.) But yet the contrary course hath for a long time obtained at *Newgate*, and nothing is more ordinary than after the jury sworn and charged with a prisoner, and evidence given; yet if it appear to the court that some of the evidence is kept back or taken off, or that there may be a fuller discovery, and the offense notorious, as murder or burglary, and that the evidence, though not sufficient to convict the prisoner yet gives the court a great and strong suspicion of his guilt, the court may discharge the jury of the prisoner and remit him to the gaol for further evidence; and accordingly it hath been practiced in most circuits of *England*,* for otherwise many notorious murders or burglaries may pass unpunished by the acquittal of a person probably guilty, where the full evidence is not searched out or given."

Hale's Pleas of the Crown, 1st Am. ed., vol. 2, pp. *294 and 295.

*Yet to this is added a note ("*a*") which shows that there was no established practice.

BLACKSTONE says:

"When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (*unless in cases of evident necessity*) till they have given in their verdict."

Blackstone's Commentaries, vol. 4, p. *360.

And while HALE appears to place the right of discharge on light and trivial grounds, both unfair and unjust to the prisoner, such as "that some of the evidence is kept back, or taken off, or that there may be a fuller discovery," Blackstone (and other text-books) places the right upon the ground of "NECESSITY." The exceptions grew up manifestly in disregard of the ancient and established maxim against double trials, and, as a matter of convenience, to avoid the necessity "of carrying the juries around," and other apparently oppressive treatment; but there has never been any pretense, supported by any authority worthy of consideration, that the rule or maxim itself was, in any respect, incorrect or improper. It, in fact, remains in its original strength, and it may be well doubted whether the exceptions, apart from the provision of the Constitution, can be sustained upon principle.

THE CONSTITUTION TO BE CONSTRUED, TO A GREAT EXTENT, IN THE LIGHT OF THE MAXIM AND PRINCIPLE THAT NO ONE SHALL BE TWICE PUT IN JEOPARDY, AND THE ORIGINAL PRACTICE AS RESPECTS THE DISCHARGE OF JURY.

It is in the light of the maxim or rules with regard to double trials and the discharge of jurors that the provision of the Constitution of the United States is to be carefully considered; and, *first*, in doing this, it should be remembered that *at the time of the adoption of the amendments* the rule or principle prohibiting a second trial for the same offense and the discharge of the jury was sustained by the text-books from which citations have been given, and the

judicial opinions referred to in England, and that exceptions to the maxim or principle had been, to some extent, engrafted upon it, and that a disposition existed to increase these in favor of the Crown and against the subject. These facts doubtless had a large influence upon Congress in the proposal of the amendments, and upon the people of the States in their ratification. It became important, as far as possible, to formally guard against the invasions of the sacred and established rights of the citizen, and protect them from the views and harsh constructions of the judiciary; and hence the prohibition: "Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb." And, second, this was done with phraseology stronger and, it should be observed, more comprehensive, more distinct, than that of the original maxim or the text-books; for, instead of only declaring that no person *should* be twice put in jeopardy, it declares that no person shall be so much as SUBJECT to be twice put in jeopardy. No act, no thing shall be done, no order of a court, whatever its character, shall be made, which may lead to an individual being, *not twice tried, but* TWICE PLACED IN A POSITION WHERE THE POSSIBILITY OF A SECOND TRIAL MAY EXIST.

THIS VIEW SUSTAINED BY TEXT-BOOKS AND DECISIONS OF NUMEROUS COURTS.

It will be found, upon examination, that this view, gathered from the letter of the Constitution and from a review of the ancient rules and maxims, is sustained by the greater portion, if not all, of the text-books of established reputation as well as by the greater portion of adjudicated cases.

I.—THE TEXT-BOOKS.

Passing by a number of the older works, a few of the more modern and leading may be referred to.

And, first, Cooley's Principles of Constitutional Law may be cited:

"*Twice in Jeopardy.*—The fifth amendment forbids that any person shall be subject, for the same offence, to be twice put in jeopardy of life and limb. This is an old phrase, which has come from times when sanguinary punishments were common; but the meaning is, that no person shall be put on trial a second time for the same offence after he has been tried and convicted or acquitted. But some explanation is necessary, since in some cases one may be entitled to the benefits of an acquittal *though a verdict has never been returned.*

"*A person is in jeopardy when he is put upon trial before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been impaneled and sworn to try him.** The accused *then becomes entitled to a verdict* that shall forever protect him against any future prosecution,† AND A DISCHARGE OF THE JURY WITHOUT HIS CONSENT is *equivalent to an acquittal*, except in the few cases in which a discharge without a verdict becomes a necessity."‡

Cooley's Principles of Constitutional Law, pp. 296 and 297.

In his Constitutional Limitations the same writer says:

"A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverence. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause."

Cooley's Constitutional Limitations, 2d ed., p. *327.

"*McFadden *vs.* Commonwealth, 23 Penn. St., 12; O'Brian *vs.* Commonwealth, 9 Bush (Ky.), 333.

"†Barker *vs.* People, 3 Cow. (N. Y.), 686.

"‡People *vs.* Barrett, 2 Caines (N. Y.), 304; Nolan *vs.* State, 55 Geo., 521."

From Bishop's Criminal Law the following citation may be given:

"§ 1012.—NATURE OF THIS SUBJECT—DECISIONS ON CONSTITUTIONAL LAW.—The subject of this sub-title is, in its nature, difficult and intricate: and it is rendered more so by the many conflicts of judicial opinion to be found in the reports. But it will be helpful to bear in mind that this investigation relates to constitutional law in the American sense; and that, though the courts should have wandered, still the ever-present power of the Constitution has remained over them. Our guide, therefore, is the Constitution, and the decisions occupy the subordinate place of giving light to what leads us, instead of leading us themselves. True, it is the habit of the courts to look at decisions upon constitutional law much as they do upon decisions relating to other subjects. But, when they reflect more deeply, they will see that our constitutions provide the way in which they may be amended, and the way does *not* consist of judicial decisions. Doubtless, no court, however enlightened, will overrule a previous determination on constitutional law without perceiving very clearly that it was wrong. But, in a plain case, where there is neither doubt nor room for doubt, a bench of judges to-day is not justified in violating the Constitution because a bench of judges yesterday did the same thing."

"§ 1016.—CONTINUED—READY FOR TRIAL—NOL. PROS.—WITHDRAWING JURYMAN.—But when, according to THE BETTER OPINION, THE JURY, BEING FULL, IS SWORN, AND ADDED TO THE OTHER BRANCH OF THE COURT, *and all the preliminary things of record are ready for the trial, the prisoner has reached the jeopardy, from the repetition of which our constitutional rule protects him.* During the trial, the prosecuting officer is not authorized to enter a *nol. pros.*; or, if he enters it, even with the consent of the judge; or, if he withdraws a juryman and so stops the hearing the legal effect is an acquittal. The defendant is thereupon entitled to have a verdict of not guilty returned by the jury; but, if this is not done, he may still claim his discharge, and he is not to be brought again in jeopardy for the same offence."

Bishop's Criminal Law, 5th ed., vol. 1, secs. 1012 and 1016.

HARRIS says:

"The Constitution of the United States provides that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb. The equivalent provision in the State constitutions is more commonly in the form that no person shall be put in jeopardy twice for the same offense. In Iowa it is: No person shall, after acquittal, be tried for the same offense. Jeopardy begins when the trial jury is sworn. If, after that, without assent of the defendant, the prosecuting attorney enters a *nolle prosequi*, or the court, without sufficient cause, discharges the jury, the effect is the same as an acquittal; the defendant is finally discharged, and cannot be tried again. THE DEFENSE OF 'ONCE IN JEOPARDY' IS THEREFORE BROADER THAN THE STRICT PLEA OF 'FORMER ACQUITTAL.'"

Harris' Principles of Criminal Law (annotated by M. F. Force, Professor of Equity and Criminal Law in the Cincinnati Law School), p. 311.

The same view is presented in substance in—

II.—ADJUDICATIONS.

There is no decision of the Supreme Court of the United States in which the clause of the Constitution has been immediately and distinctively considered and determined. The cases in which it has been incidentally referred to will be noticed hereafter.

1. CIRCUIT AND DISTRICT COURTS.

In the circuit and district courts the question has perhaps been more fully considered.

(1.)

In the case of United States *vs.* Joseph Haskell and Charles Francois, 4 Washington's Cir. Ct. Rep., 402, the distinction between the plea of *autrefois acquit* and *former jeopardy*, arising on a motion as referred to in the last authority cited (viz., Harris' Criminal Law), seems to be fully sustained.

The indictment contained four counts: "First, for making a revolt; second, for piratically and feloniously running away with the vessel and goods, to the value of $50; third, for laying violent hands on the captain, to hinder his fighting in defence of his vessel; and, fourth, yielding up the vessel to a pirate." The jury were unable to agree, and it turned out that one of the jury "was insane, and totally unfit to act as a juryman," and the court caused the following entry to be made on the minutes: "The jury having been kept together three days, and more than twenty-four hours without refreshments, and there being no prospect of their agreeing, and the court being satisfied of the insanity of one of the jurymen, discharges the jury without the consent of the counsel for the prisoner." Subsequently, when the case was taken up for another trial, the defendants, through their counsel, tendered to the court a special plea, in which was stated the arraignment of the prisoner, etc., "and the discharge of the jury by the court without the consent of the prisoners or their counsel," and that such "discharge was equivalent to an acquittal, and praying judgment of the court if they might again be put on their trial and in jeopardy of their lives." The district attorney immediately demurred generally to the plea. He contended, "1, that the matter of this plea is not a fit subject for a plea; and, 2, that the discharge of the jury in this as well as in all other cases of necessity rests in the sound discretion of the court, and this discretion was soundly exercised in this case.

It will be observed that there was no motion made, based upon the action of the court, but simply a plea in the nature of *autrefois acquit* presented. And, accordingly, WASHINGTON, J., in delivering the opinion of the court, says: "The first and the most important question which arises upon these pleadings is, is the subject-matter of this plea properly pleadable in bar of a second trial of the prisoners?" and he adds, that "the plea avoids stating the recorded reasons of the court for discharging the jury, and places the discharge on the

single ground that the jury declared they could not agree." And, referring to the plea, JUSTICE WASHINGTON says: "Whatever name may be given to this plea, one thing is clear, that it is not a plea of *autrefois acquit;* nor could the counsel have ventured such a plea, because it must have stated a verdict of acquittal and the judgment of the court thereon, which the record, to which the plea must have referred, upon the replication of *nul tiel* record, would have falsified. The plea, indeed, does not profess to be a plea of *autrefois acquit*, for it merely alleges the discharge of the jury *as equivalent* in law to an acquittal. I shall examine this question under the following heads: First, is there a single precedent to be found to support this plea? Second, can it be supported upon principle? or, thirdly, on authority of any kind?"

He then proceeds to hold (1) that the plea "is a novelty in the law, and that circumstance of itself is a persuasive argument against its validity;" (2) that to permit a jury to pass upon the condition of the juryman as a matter of fact would be to introduce practice "repugnant to reason and to law;" and (3) that the plea could not be maintained upon authority. But, while holding that *the plea* could not be maintained for the reasons mentioned, he adds:

"By reprobating this plea we do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal, since he may have all the benefit of the error, if committed, by a motion for his discharge, or upon a motion in arrest of judgment."

The court thus distinctly declares that, while the action of a court, such as this case presented, may not be examined on a plea of *autrefois acquit* or a plea in the nature of a plea of *autrefois acquit, nevertheless it may be done on a motion for discharge or in arrest of judgment, and that this motion may prop-*

erly rest upon the improper discharge of a jury, which becomes equivalent to an acquittal."

This case, therefore, SUSTAINS the position that there cannot be a double trial, or proceedings in actions which may approach to it, and that whatever tends to bring about such a trial may be presented as objectionable under a motion, while it may not be under the formal plea of former acquittal, which, from its very nature, involves the idea of a consummated trial; or, in other terms, matters which do not come fully within the technical exactness of a plea cannot be embraced in it; but, at the same time, the defendant may avail himself of such matters otherwise and derive the full advantage from them by a motion in arrest of judgment or for a discharge.

(2.)

This same view, "with additions," will be found more elaborately presented in the case of The United States *vs.* Ethan L. Watson and others, 3 Benedict, p. 1, in which the opinion was delivered by BLATCHFORD, J., in the district court of the United States within the second circuit. The indictment in this case was for "aiding and abetting in the concealment of thirteen barrels of distilled spirits," &c. The minutes of the court showed that the indictment was taken up at the instance of the district attorney on the 10th of June, 1868; twelve jurors were sworn; the case was adjourned until June the 11th, when the cause was called, and "by reason of the illness of the district attorney and the absence of witnesses for the United States the trial was adjourned, and the jurors empanelled therein were continued until the 19th of June following." That upon the 23d of June the trial was resumed, and "the assistant district attorney moved that the trial go off for the term, owing to the illness of the district attorney and the absence of witnesses for the prosecution;" and thereupon the court "directed a

juror to be withdrawn, and the trial was accordingly postponed for the term." Subsequently the indictment was called again for trial, and "the defendants objected to any further or second trial, and moved for the discharge of the defendants and of their bail, on the ground that the above proceedings set forth in the minutes of the court were equivalent in law to an acquittal of the defendants on a trial of the indictment;" and the motion was entered upon the minutes of the court.

The court, after a review of various authorities, held:

"When the trial of an indictment has been commenced by the swearing of the jury the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper. (Wharton's Criminal Law, ed. 1852, page 213.) It is impossible, within this definition, to lay down any inflexible rule as to what causes would and what causes would not be sufficient to warrant the exercise of the discretion which the court possesses. It is sufficient to say that in no case to be found in the books has any such reason as is spread upon the record in this case been admitted, in the absence of the consent of the defendant, to be a proper ground for discharging a jury after they have been sworn and empanelled to try an indictment. To hold now that the record of the proceedings of the court on the former trial amounts to a verdict of acquittal, is to do just what the court would have done at that time on the facts stated in the record. If I had any doubt as to the propriety of this course I should resolve it in favor of the liberty of the citizen rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion. *But the weight of all the authorities on the subject is, that the position of this case, as it stood when the juror was withdrawn, entitled the defendants, in the absence of their express consent to any other course, to a verdict of acquittal, and, therefore, entitles them to the action of the court at this time on their application to the same effect. An order will, therefore, be en-*

tered declaring that the proceedings on the former trial are held to be equivalent to a verdict of not guilty, and discharging the defendants and their bail from further liability in respect of the indictment."

It will be observed that this case is in harmony with that in 4th Washington, inasmuch as it appears that the discharge took place upon the motion of the prosecuting officer; and *it clearly decides that the discharge of the jury was equivalent to a plea of former acquittal.* And it sustains the construction that no act or thing can be done by a court which tends to place a party twice in jeopardy for the same offense, unless it be one of overruling and absolute necessity, constituting on this exclusive ground an exception to the constitutional principle. And it may well be doubted whether *this* is not carrying the power to discharge beyond the provision of the Constitution.

(3.)

In the case of The United States *vs.* Andrew Shoemaker, in the seventh circuit, 2 McLean, p. 114:

"The defendant was indicted for feloniously taking letters from the mail, he having possession of it as carrier, which contained bank notes, etc. The jury were impaneled, and witnesses sworn, when the prosecuting attorney abandoned the prosecution and entered a *nolle prosequi* on the indictment." Two points were "raised for consideration and decision in this case: First, had the prosecuting attorney a right to enter a *nolle prosequi* in this case? Second, does such an abandonment amount to an acquittal of the defendant?"

The court, in its opinion, states that "a court may discharge a jury, in a criminal case under peculiar circumstances, after they are sworn and have heard all the evidence;" and then, responding to the two questions, held (1) that the prosecuting attorney had no right to enter a *nolle*

prosequi after the jury were sworn, and (2) that a discharge of a jury upon the entering of a *nolle prosequi* was equivalent to an acquittal, and says:

"Here is no verdict of acquittal, and, consequently, no judgment on the verdict. The plea of a former acquittal is NOT, THEREFORE, TECHNICALLY SUSTAINED. But there is a judgment in favor of the defendant that he go without day; and this necessarily followed the abandonment of the prosecution. Can this judgment be considered as substantially sustaining the plea? On this point I confess that I entertain strong doubts. * * * In the cases referred to in 17 Pick. and 4 Black, the court decided that where the jury were sworn and some evidence heard the prosecuting attorney had no right to enter a *nolle prosequi*, and that the defendant was entitled to a verdict. It is not said, however, in either of these cases what the effect to the defendant would have been had the *nolle prosequi* been entered. In Commonwealth *vs.* Cook, 6 Serg. & Rawle., 577, the court decided that a discharge of the jury once sworn in a criminal case was an acquittal of the defendant. The case must be considered on principle, if the point has not been decided. * * * In the case under consideration the prosecuting attorney had no right to enter a fornial abandonment of the prosecution; and from this it follows that THE DEFENDANT HAD A RIGHT TO A VERDICT. There is no defect apparent on the face of the indictment. But the prosecution was formally abandoned, which left the jury nothing to try; and if this proceeding shall not be regarded as a verdict of acquittal, is not the defendant manifestly prejudiced? Was he not in peril? The *nolle prosequi* was entered without the consent of the defendant and against his remonstrance; and it was entered against his rights, and without power or right by the prosecutor. On principle, therefore, we feel bound to say that the proceeding must be considered EQUIVALENT to a verdict of acquittal, and, as such, with the judgment of the court thereon, is a bar to the present indictment."

(4.)

In the case of United States *vs.* John Varring, in the circuit court of the District of Columbia, 4 Cranch, p. 465, the defendant was indicted—

"For stealing two silver dollars and an order drawn by Hoffman and Stephenson on ——— for $15. Upon the trial the order produced in evidence was drawn by Hoffman and Stephenson. Mr. Key, attorney for the United States, thereupon directed the clerk to enter a *nolle prosequi*, and the jury was discharged without the consent of the defendant, and a new indictment was found by the grand jury reciting the order truly. A verdict of guilty was found upon this second indictment subject to the effect of the *nolle prosequi* and discharge of the jury AS IF SPECIALLY PLEADED. Motion in arrest of judgment for that cause. * * * The court (THRUSTON, J., *contrà*) arrested the judgment, being of opinion that the discharge of the jury without the defendant's consent was equivalent to an acquittal as to the dollars, and that the defendant might have pleaded it with an averment that the stealing of the dollars and of the order was one act of taking, if such an averment be necessary, which is doubtful, as the indictment charges it to be one act of theft, and upon a general verdict of guilty he would have been sentenced to the penitentiary."

It will be seen that in some of these cases the clause of the Constitution is held or indicated to be larger or more comprehensive than the more technical plea of former acquittal; and that the discharge of the jury without the consent of the prisoner is equivalent to an acquittal. It is not maintained in all the cases that this discharge may not take place in extreme or exceptional cases, but that ordinarily it cannot, and that the provision of the Constitution cannot be evaded by the action of the prosecuting officer or of the presiding justice.

2. STATE COURTS.

These will be arranged, to some extent, geographically. Many cases will be omitted, except by mere references; enough will be given, however, to represent the views held in various sections.

(1.)

NEW YORK.

The case of Klock *vs.* The People, 2 Parker's Criminal Rep., 676, was an indictment for the crime of arson. In the progress of the case, the court rejected evidence offered on the part of the prosecution, on the ground that it required record proof, and upon exclusion of the evidence the district attorney moved, without the consent and against the objection of the accused, that a juror should be withdrawn and the jury discharged. This was done. At the next term of the court the case was moved for trial, "and the defendant set up, by way of plea, the foregoing facts in bar of the further prosecution of the indictment," which plea was demurred to. The court, through ALLEN, J., among other things in the opinion, says:

"The objection upon which the plaintiff in error relies to the further prosecution of the indictment was not necessarily taken by plea, but might have been taken by way of exception to a second trial, or by a motion in arrest of judgment; and as there has been no technical trial, resulting in a verdict and judgment, on which a plea of *autrefois acquit* or *convict* can be based, it may be doubtful whether the objection can be taken by plea. * * The real question is, whether it is allowable for a public prosecutor, after having entered upon his case by the giving of evidence to a jury empaneled for the trial of an indictment, to withdraw a juror, and thus arrest the trial, so as to enable him to try the party at a subsequent time, solely because he finds himself unprepared with the proper evidence to convict where his condition is not the result of improper practice on the part of the defendant, or some one acting with and for him, or some *overruling, inevitable necessity.*"

In answering the question, the court said:

"The true ground of the objection lies back of the Constitution, and is found in the principles which have been deemed essential to the full and fair protection of individ-

uals accused of crime, and to secure to them a speedy and impartial trial, and the best means of indicating their innocence. The practice and the views of courts of criminal jurisdiction upon questions somewhat analogous to that presented in this case, have passed through some modifications. Kent, J., in People *vs.* Olcott, (2 J. C., 301,) refers in detail to the earlier cases bearing upon the point, and while his review of the cases shows distinctly the modification and changes which have taken place in the practice of courts, it also shows the great tenderness and care manifested by the judges for the rights of the accused, and to secure to them every right essential to their defence, and an anxiety to protect them against any act or omission of the Government or the public prosecutor which could injuriously affect them. They have felt at liberty to interfere and arrest a trial and dispense with a verdict from a jury once empaneled, *only when compelled to do so by some necessity, or by some improper and fraudulent act of the accused, which would or might interfere and prevent a full and fair trial or impartial verdict.*"

Then, after referring to various other decisions to sustain this view, the conclusion of the court was announced in these words:

"The decision of the court below (allowing the prisoner to be placed upon trial a second time) was erroneous and must be reversed and the defendant discharged."

The case of Grant *vs.* The People, 4 Parker's Crim. Reps., p. 527, was an indictment for seduction. The prisoner was placed on trial, a jury empaneled and sworn, and, *without the consent of the defendant*, "discharged and separated without rendering any verdict, and *without disagreeing or other special cause, but by mere irregularity.*" These facts were stated in a special plea on which issue was joined. In the opinion of the court the following occurs:

"If the facts alleged in the special plea are true, there can be no doubt under the decisions in our own courts and elsewhere, that the defendant cannot be tried upon the indictment. * * In the case now before us the special plea excludes the *existence of any necessity*, and all grounds for

the exercise of the discretion of the court. It alleges that the jury was 'discharged without disagreeing or other special cause, but by mere irregularity,' and that this was done without the consent of the defendant. In Mahala *v.* The State (10 Yerg. R., 582), the Supreme Court of Tennessee held that there was no power to discharge a jury in a criminal case without the consent of the defendant, except in cases of manifest necessity. When the jury are unwarrantably discharged, it is equivalent to an acquittal. The law to warrant the discharge of the jury, must be one of uncontrollable emergency. (The State *v.* Waterhouse, Mart. & Yerg. R., 278.) The English cases are all cited in the case of Mary Catharine Newton (66 E. C. L. R., 716, *supra.*) The *arbitrary discharge* of a jury in a criminal case against the consent of a defendant, without any cause, and where no circumstances exist calling for the exercise of the discretion of the court (which is the case presented by the special plea of the defendant), is a bar to a subsequent trial of the defendant upon the same indictment."

The court also held that the prohibition as respects double trials applied to misdemeanors as well as to felonies.

The case of People *vs.* Barrett, 2 American Decisions, p. 239, (2 Caines, 304,) was an indictment for conspiracy. The jury were sworn and some of the evidence presented. The District Attorney offered parol testimony of a note which he had previously called on the defence to produce. This was objected to from want of due notice. The parol testimony was overruled, whereupon the District Attorney "moved for leave to withdraw a juror, which was granted without the defendants' consent. Subsequently the defendants were again arranged and tried, and found guilty on the same indictment. The question was, were these facts sufficient to arrest the judgment?"

The opinion of the court, by LIVINGSTON, J., is brief, and may be stated in full:

"Without denying the right of courts to withdraw a juror in criminal causes, and put the defendant on his trial a second time, it is evident this power should not be lightly

used, *but confined as much as may be to cases of very urgent necessity, where, by the act of God, or by some sudden and unforseen accident, it is impossible to proceed without manifest injustice to the public, or the defendant himself.* We do not mean at present to define all or any of the cases in which this practice may be pursued, but we all agree that a defendant ought in no case to be put on a second trial for the same offense where a juror has been discharged on no other ground than because the public prosecutor found himself unable to proceed for the want of sufficient testimony to convict, and where this inability was the consequence of his not taking the necessary measures to obtain it. To discharge a juror under such circumstances would be liable to great abuse and oppression. If the prosecutor disliked the juror, or some of them, or hoped to find the defendant less prepared at a future day, or wished unnecessarily to harass him, he might at any time attain his end, if, by solely alleging the want of proof after a jury were sworn, he could get rid of them. It will be much better that the guilty now and then escape in this way than to introduce or sanction a practice which may place the innocent entirely in the power of a court or a public prosecutor, which this mode of trial was intended to guard against. It will be recollected there was no improper practice here on the part of the defendants, or any tampering with witnesses to keep them out of the way. In saying they were ready for trial, the defendants told no more than the truth; but such declaration could not have obliged them to produce a paper against themselves, and which it does not appear they had with them. We are, therefore, of opinion that the court below ought not to proceed to judgment on this conviction, but discharge the defendants."

(2.)

PENNSYLVANIA.

The case of Commonwealth *v.* Cook, 9 American Decisions, p. 465 (6 Sergeant & Rawle, 577), as representing decidedly the view that a jury may not be discharged, after it is impaneled and sworn, without the ground being laid for the prevention of the impaneling and swearing of a second jury,

has already been referred to, so far as the opinion of Mr. Justice Duncan is concerned. In that case, the indictment was for murder against three defendants, and a plea of *autrefois acquit* was filed by the defendants, as well as a motion to be discharged. The grounds of the plea and motion were that the jury, after agreeing on a verdict as to two, and not as to the third, and having stated that there was not "the least probability of their agreeing," the court refused to permit the jury to pronounce the verdict as respects the two, and, without and against the consent of all the prisoners, the jury were discharged.

TILGHMAN, C. J., in delivering the opinion, said:

"Concerning the power of the court to discharge a jury in a capital case, judges have not always agreed. It is one of those questions which remained long unsettled, nor even yet has any general rule been established which embraces all cases."

And he then states:

"Where the indictment is good, and the jury are charged with the prisoner, his life is undoubtedly in jeopardy during their deliberation. If they are divided in opinion, and especially if there should be a great majority in favor of the prisoner, he has gained an advantage of which he is deprived if the court discharge the jury."

And adds, that it cannot be done—

"Without violating the Constitution, and taking from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time."

In the case of McFadden *vs.* The Commonwealth, 23 Penn. State Rep., 12, which was an indictment for murder, the panel was not entirely complete, and in consequence of some difficulty arising in the selection of the jury, the defendant stood mute, apparently because the court had, at the request of the district attorney, allowed him (the district attorney)

to challenge one of the jurors who had been empanelled, and a juror was empanelled who had been challenged by the Commonwealth for cause, the challenge being then withdrawn. "Thereupon, on motion of the district attorney, the court, without the consent and against the will of the prisoner, dismissed the jurors empanelled, and the case at that time ended. The jurors had not been sworn or affirmed severally in the case. At the next succeeding term the indictment was ordered for trial, when the prisoner's counsel preferred certain special pleas, in which the facts before stated were in substance alleged." To this a replication was filed, and a demurrer filed by defendant, upon which the court gave judgment for the Commonwealth. The defendant refused to plead, and the court entered the plea of "not guilty," and the prisoner was convicted.

"Motions in arrest of judgment were filed, which were overruled, and the prisoner was sentenced to imprisonment." The errors assigned were: 1. The court erred in giving judgment for the Commonwealth upon the defendant's demurrer. 2. In discharging the empanelled juror against the prisoner's consent. 3. In dismissing the empanelled jurors and continuing the case against the prisoner's consent. 4. In permitting the prisoner to be tried a second time, he having been previously put in jeopardy of life and limb for the same offence."

The judgment of the court was affirmed, but in the opinion as delivered by BLACK, C. J., the following occurs:

"If it can be legally said of the prisoner that the proceedings at the first term after the indictment was found placed him in jeopardy, the subsequent conviction was wrong and should be reversed. Neither the Constitution nor the rules of the common law will permit a man to be twice tried for the same offense.

"It seems unnecessary to say that the mere continuance of a cause is within the discretion of the court. Refusing it to a prisoner when he gives good reasons for it, or granting it to the Commonwealth without any reason at all, is neither

a defence to the accused party when he comes to be tried, nor a legal assignment of error in this court. But a discharge of the jury in a capital case, after the trial has begun, is not a continuance of the cause. It is the end of it; and, for all purposes of future protection, it is the same to the prisoner as an acquittal, unless it was done with his own consent or demanded by some overwhelming necessity, such, for instance, as the sickness or death of a juror.

"When does the trial begin? Not, properly, until the jury is *charged* with the prisoner. But the practice of formally charging the jury is not generally observed in the courts of this State, and we cannot refuse to a party any of the rights which he would otherwise have merely because a form is omitted by the public officers. We must, therefore, hold that the jury has the prisoner in charge when a full jury is empanelled and all the jurors are sworn. Previous to this everything that is done is merely preliminary, and up to this point the court may postpone the trial as lawfully at one stage of the proceedings as at another.

"To place a man in jeopardy he must be in peril from the verdict of a particular jury. He cannot be so by the calling of eleven, for they can give no verdict; nor is he endangered by twelve unless they are sworn. Until they have taken the oath they are not jurors, and have no more control of his fate than any other equal number of citizens. His trial cannot begin until the tribunal which is to try him is organized and qualified. If he is in jeopardy at any earlier period, he is in jeopardy from the hour when the first informal accusation was made, and at every step of the subsequent proceedings against him. To say this would be to assert what no ingenuity can reconcile with either authority or reason."

This reasoning is clear and distinct.

The case of The Commonwealth *vs.* Clue, 3 Rawle, p. 498, was an indictment for murder. The jury were discharged because they came into court, "and answered to their names, and declared that they had not agreed upon their verdict, and that they did not think they were likely to agree upon their verdict." "Two of the jury * * stated that they were unwell, and one of the jury * * declared that if he were much longer confined * * his life would be endan-

gered," &c.; that "he was seventy-six years of age," and that his health had been impaired "by an attack of illness, from which he * * had only been relieved about a month," &c. They were both sworn to the truth of their statements, and a doctor visited the jurors, and gave his certificate as to their previous health. The court accordingly, "without and against the consent" of the defendant, ordered the jury to be dismissed, declaring their opinion that a case of necessity for the discharge of the jury existed. A plea setting forth the facts was filed and demurred to.

GIBSON, C. J., delivered the opinion, and, in doing so, referred approvingly to the case of Commonwealth *vs.* Cook, and, among other things, used the following language:

"I take it on grounds of reason as well as of authority, then, that a prisoner of whom a jury have been discharged before verdict is given, may, by pleading the circumstances in bar of another trial, appeal from the order of the court before which he stood to the highest tribunal in the land; nor do I understand how he shall be said not to have been in jeopardy before the jury have returned a verdict of acquittal. In the legal as well as the popular sense he is in jeopardy the instant he is called to stand on his defence, for from that instant every movement of the Commonwealth is an attack on his life, and it is to serve him in the hour of his utmost need that the law humanely adds to the joinder of the issue a prayer for safe deliverance. The argument must therefore be, that he is not put *out* of jeopardy unless by a verdict of acquittal; and that to try him a second time, having remained in jeopardy all along, is not to put him in jeopardy twice. In this aspect it must be obvious that the argument is an assumption of the whole ground in dispute. If the prisoner has been illegally deprived of the means of deliverance from jeopardy, every dictate of justice requires that he be placed on ground as favorable as he could possibly have attained by the most fortunate determination of the chances."

And he concludes the opinion in these words:

"There cannot be a doubt that the indisposition of the

two jurors here would have been speedily removed by appropriate nourishment, and their temporary exhaustion, therefore, was not an available ground to divest the interest which the prisoner had in the verdict. Her plea of *autrefois acquit* has not been mentioned [maintained] by the production of a sufficient record; but her other special plea is available in law, and we are of opinion that the demurrer be overruled. She is therefore discharged."

(3.)

VIRGINIA.

The case of Williams *vs.* The Commonwealth, 2 Grattan, p. 567, was for

The court approved of the Pennsylvania decisions. The opinion is in these words:

"The question presented for the consideration of the court is, whether the court, in a case of felony, can properly discharge the jury who are sworn in the case, without the consent of the accused, merely because the jury cannot agree. We think the courts have not and ought not to have such power. No such practice has ever prevailed in Virginia, and, so far as the judges now composing this court are informed, this is the first instance in which it has been done or attempted. In looking to England, we do not find any such power to have been exercised or claimed there. In looking to our sister States, we find the practice has varied. * * In Pennsylvania the judges have denied the power. We incline to the views and reasoning of the courts of Pennsylvania on this important subject." And it is added: "The accused is entitled to be tried by the jury he has selected in the first instance, unless there be some imperious necessity for their discharge."

(4.)

GEORGIA.

The case of Nolan *vs.* State, 1 Hawley's American Crim.

Reps., p. 532, (55 Ga., 521,) was an indictment for murder. A jury was empanelled, evidence submitted, argument had, and charge delivered.

"Subsequently, while the defendant was confined in jail, in the absence of his counsel, and without his consent, the jury returned a verdict finding him guilty of voluntary manslaughter, and were discharged. The defendant, at a subsequent term, moved that said verdict be set aside, on the ground that it was rendered and published in his absence, and without his right of being present having been waived. The court ordered accordingly. The defendant was subsequently arraigned a second time upon the same indictment, when he pleaded specially in bar the aforesaid facts as constituting his having been placed once in jeopardy, and claimed his discharge. The plea was overruled by the court, and defendant excepted. A verdict finding the defendant guilty of voluntary manslaughter was returned. Error is assigned upon the above ground of exception."

In delivering the opinion of the court, BLECKLEY, J., says:

"One trial, and only one, for each crime, is a fundamental principle in criminal procedure, and must be the general rule practically administered in all free countries. For the public authority, whether King or Commonwealth, to try the same person over and over again for the same offense would be rank tyranny. It would amount, in capital cases, to cruelty not unlike that of keeping a loaded repeater pointed at the prisoner's head, and, with deadly purpose but bad aim, discharging slowly one cartridge after another. Though some exceptions to the general rule are to be admitted, as when a new trial is had on the prisoner's motion, or when judgment upon a void indictment has been arrested, the transcendant importance of the rule itself requires that the exceptions should be few, and strictly guarded.

"Where a first trial is complete, and its result, whether conviction or acquittal, left to stand, there is little or no room for any diversity of opinion on its sufficiency to bar a second. In such a case the ordinary plea of former conviction or of former acquittal is applicable in terms, and would be

upheld by all courts alike. But we reach debatable ground when we come to those cases in which trials have been begun but not ended, and some others in which the endings have been ineffectual, because irregular or wholly void. Courts are not fully agreed where jeopardy begins, or how far the defense of one in jeopardy differs, if at all, under our American constitutions, from that of *autrefois convict* or *autrefois acquit* under the English common law. In the view of some judges, jeopardy arises not out of the trial, but out of the verdict, as if, in a combat intended to be mortal, there is no danger of being slain until you are hit.

"The former decisions of this court have tended always to treat a jury, when impaneled, sworn, and charged with the case, as the consecrated body of peers whose individual minds and personal consciences are laden with the prisoner's destiny. Not *a* jury simply, but *this* jury, are to pronounce upon his guilt or innocence. They and they alone are to pass between the State and the prisoner and arbitrate the grave matter in dispute. Their decision may or may not be final as against the prisoner, but it will conclude the State forever unless annulled at his instance. Though he may avoid it for any material error committed against him, the State cannot avoid it at all, but is bound by it irrevocably, so long as he suffers it to stand. He has a right to have it made up and legally returned into court, so that he may, if it suits him, accept it. A verdict on *this* trial and from *this* particular jury, not on some *future* trial before *another* jury, is what he may demand, and what the State, subject only to obstacles amounting to legal necessity, undertakes to afford. 'What say you, gentlemen of the jury, am I guilty or not guilty?' To this question he is entitled to an answer, if to obtain it it be within the compass of legal possibility. He takes the risk of its being adverse, and may claim whatever chance there is of its being favorable. No fear of the situation is upon him, and he is entitled to its hopes also. Condemnation or deliverance here and now is the one alternative. Only with his consent or for some legal necessity can the crisis be ended whilst the voice of his jury remain undeclared."

The opinion is then fortified by citation of various authorities.

(5.)

TEXAS.

Case of Bud Powell *vs.* The State, decided by the court of appeals of Texas. It does not appear in the report of this case, as contained in the *Chicago Legal News* of July 26, 1884, what the crime was for which the defendant was indicted, but he was twice placed upon trial at the same term of the district court. Upon a statement by the jury that they could not agree, the State's attorney and the defendant's counsel were asked by the court if they were willing that the jury be discharged, and defendant objected, and thereupon, the State's attorney consenting, the court discharged the jury, which, with the associate facts, were embraced in a bill of exceptions.

Referring to the provision of the Constitution of Texas and of the United States, the court (per White, P. J.) say:

"'The constitution of a State is higher in authority than any law or order made by anybody assuming to act under it.' 'Every positive direction in it contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision.'"

And, after overruling an act of the Legislature on the ground of its interference with the Constitution, the court say:

"As before stated, however, the meaning of the term 'former jeopardy' has, in our opinion, been fixed long before the words were used in the Constitution. And whatever may be the difference of opinion entertained, the decided weight and respectability of authority has uniformly held to the construction given by Mr. Cooley in his great work on constitutional limitations.

"He says: 'A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction, upon indictment or information which is in form and substance to sustain a connection, and a jury has been charged with his deliverance; and a jury is said to be thus charged when they

have been impaneled and sworn. The defendant then becomes entitled to a verdict, which shall constitute a bar to a new prosecution, and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officers against his will, or by a discharge of the jury and continuance of the cause.' (Cooley's Const. Lim., 15 ed., 404.) * * Following in the wake of these authorities, this court has said, in Vestel *vs.* The State, 3 Texas Court of Appeals, p. 652,: 'It seems now to be as well settled by authority as reason that when a party is once placed upon his trial for a public offense, involving life or liberty, on a valid indictment, before a competent court, with a competent jury impaneled, sworn, and charged with the cause, he has reached and is placed in jeopardy, from a repetition of which on the same indictment, or any other indictment for the same offense, this constitutional shield forever protects him; and, after jeopardy has once so attached, a discharge of the jury, without the consent of the defendant, before they have rendered their verdict, is equivalent to a verdict of acquittal.' (See, also, the word 'jeopardy' defined in conformity with these authorities and others (2 Bouv. Law Dict., p. 1). * * * If the views heretofore expressed with regard to *jeopardy* be correct, then the appellant in this case was, as shown by his bill of exceptions, in legal jeopardy when the jury trying him was discharged by the court."

(6.)

OHIO.

In the case of Stewart *vs.* The State, 15 Ohio St., 155 (cited in 1 Am. Crim. Rep., p. 527), after the trial had begun, it appeared that one of the jurors had been a member of the grand jury that found the indictment. "The judge inquired of the prisoner and his attorney if they objected to proceeding with the jury; the response was they did, and thereupon the court discharged the jury and had another empaneled. The prisoner claimed that having been once in jeopardy he was entitled to an acquittal," and the appellate court, through SCOTT, J., held as follows:

"At that stage of the proceeding [alluding to the announce-

ment made by the juror] the accused had the right to demand such a disposition of the case, either by verdict or otherwise, as would bar another prosecution for the same crime; of this he could not be deprived at the will of the court by the entry of a *nolle prosequi* or the discharge of the jury without an absolute necessity therefor. Such action taken without his consent would operate as an acquittal, and be a bar to any further or subsequent prosecution for the same offense. To hold otherwise would be to contravene the constitutional guaranty against being twice put in jeopardy for the same offense."

In the case of Dobbins *vs.* The State, 14 Ohio St., 493 (cited in 1 Am. Crim. Rep., p. 525), a similar opinion was rendered.

Attorney General CRITCHFIELD, for the State, said:

"It is well settled that the plaintiff in error was put in jeopardy by the first trial if the court improperly discharged the jury. A verdict is not necessary either way to put a defendant in jeopardy, and being once jeopardized, and not convicted, it is an acquittal; but it is also well settled that the court can exercise a discretion, and discharge a jury in case of absolute necessity, and where there is no reasonable hope of the jury agreeing on a verdict."

And the court, in delivering its opinion, said:

"It is perfectly well settled that if the State intervenes without a case of necessity, and prevents a verdict, the accused cannot be subjected to a further trial consistently with the constitutional guaranty that he shall not be twice put in jeopardy for the same offense."

And the following cases are cited:

Hurley's case, 6 Ohio, 400.
Mount *vs.* The State, 14 Id., 304.
Poage *vs.* State, 3 Ohio St., 229.
And other cases.

(7.)

KENTUCKY.

The case of O'Brian *vs.* Commonwealth, 1 Hawley's Am. Crim. Rep., p. 520 (9 Bush, Ky., 333), was an indictment for murder. "It seems that the accused had been indicted for the same offense by a grand jury of the same county in the year 1868, and upon his appearing to answer the charge pleaded not guilty, and a jury was selected and sworn in accordance with the law, and the accused legally and regularly put upon his trial. Witnesses were introduced on the part of the Commonwealth," and, during the progress of the testimony, one of the jurors announced from the jury-box that he was a member of the grand jury that had found the indictment; "and thereupon the court, of its own motion and against the objections of the accused and his counsel, discharged this juror and had another summoned in his stead." The trial then progressed, resulting in a verdict of guilty. The point made on behalf of the defendant is thus stated in the opinion of the court, per PRYOR, J.:

"It is now insisted that the accused had the right to demand that the trial under the indictment found in 1868 should have progressed, and the court had no power, without his consent and against his objection, at its mere will, to discharge the jury, thereby preventing them from making a deliverance between him and the Commonwealth; and he is for that reason entitled to an acquittal."

And then say:

"The accused had the right, under the constitution and laws of the State, to a fair and impartial trial of his case by a jury of twelve men, selected and sworn according to law, and when thus selected and chosen by him, it was their province to render and his right to demand a verdict as to his guilt or innocence of the offense charged.

"The withdrawal of the juror, Spilman, against his objection, terminated the legal existence of the jury sworn to try the issue between him and the Commonwealth, a jury to

whom he had been delivered in charge, and at whose hands he had the legal right to expect a safe deliverance. There was certainly no legal reason or necessity for discharging Spilman from the jury. He was a competent juror, although a member of the grand jury that returned the indictment into court. He had been accepted by both the Commonwealth and the accused, and nothing but his death, sickness, or some accident preventing his continuance on duty authorized the court, without the consent of the accused, to say that he should no longer constitute one of the panel. What the verdict of the jury might have been with Spilman upon it is left altogether to conjecture; yet the accused was entitled to a verdict from him in conjunction with his fellow jurors, and the court had no legal power to deprive him of this right. Section 14 of article 13, State constitution, provides 'that no person shall, for the same offense, be twice put in jeopardy of his life or limb.'

"A similar provision is also made part of the Federal Constitution, and that of almost every State in the Union. The right of trial by jury is of but little value to the citizen in a criminal prosecution against him if this provision of the Constitution can be violated and the accused left without remedy. If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the State demands, or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is this boasted right? It will not do to say to the accused that his only protection is in the sound discretion of the judge, or in the responsibilities assumed by him in taking the oath of office.

* * * * *

"While the integrity of the judiciary of this country has always been maintained, still we are satisfied the surest protection to the citizen when upon trial for a capital offense, upon such a state of facts as appears in this case, consists in the constitutional guaranty that he shall not be twice put in jeopardy of life or limb for the same offense. If the judge has the legal right to discharge the jury in a case like this, he may also discharge it on account of the absence of a witness for the prosecution, or, in every instance, and as often as the testimony is deemed insufficient upon which to base

a conviction, and subject the accused to the same mode of trial as pertains to every civil action."

It is then added:

"The opinion of Justice Washington, cited in 1 Whart. Am. Crim. Law, p. 580, although often quoted as sustaining the doctrine that the provision of the Constitution in question does not apply to a jeopardy short of conviction, and that there is no difference between misdemeanors and capittal cases in respect to the discretion of the court in discharging juries, contains this language: 'By reprobating this plea (former jeopardy) we do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal.'"

And the opinion concludes:

"We are satisfied that nothing gives more strength to, and confidence in, the judiciary of the State than an adherence to well-established principles affecting either the rights of person or property, and in a civil case we would not hesitate to decide that the former adjudication settled forever the rights of the parties. * * The Commonwealth is not in pursuit of victims; but desires to inflict punishment only in a legal and constitutional way upon the guilty."

The court accordingly ordered that the prisoner be discharged from custody.

(8.)

TENNESSEE.

In the case of Mahala *vs.* State, 31 American Decisions, p. 591, (10 Yerger, 532,) the indictment was for murder. The jury were discharged, having previously come to the court, "and assured the court that they could by no possibility agree upon a verdict," and the court adjourned. The prisoner was subsequently tried and convicted.

After referring to the importance of a trial by jury and maintaining it in its purity, and referring to the cases of

The Commonwealth *vs.* Cook *et al.*, 6 Serg. & R., 577, (9 Am. Dec., 465,) and The Commonwealth *vs.* Clue, 3 Rawle, 498, the court, in its opinion, says:

"The supreme court of Pennsylvania have decided that an inability of the jury to agree is no ground for discharging them, and in Haskell and Francois' case, 4 Wash., 411, Judge Washington says he entirely concurs with the supreme court of Pennsylvania in the opinion in Cook's case, 6 Serg. & R., that the court ought not to discharge a jury merely upon the ground that they say they cannot agree, however positive the declaration may be. These cases are of very high authority, and we consider the reasoning satisfactory."

(9.)

ARKANSAS.

The case of Lee *vs.* The State, 7 American Rep., p. 611, (26 Ark., 260,) was an indictment for murder:

"The defendant plead not guilty, to which issue was joined a jury empaneled, the witnesses sworn and put under the rule, and the cause stated to the jury by counsel, for both the defendant and the State. At this stage of the proceedings, the attorney for the State suggested to the court a variance between the date on which the murder was alleged in the indictment to have been committed and the date alleged in the original affidavit. Whereupon the court below dismissed the indictment, and referred the case to the grand jury, then in session, who found and presented to that court another indictment. * * * Upon the second indictment the defendant was arraigned and interposed two pleas: *First*, former acquittal of the offense charged in the indictment by the judgment of that court; and, *second*, 'That the State ought to be barred in this behalf, and ought not further to prosecute her said indictment against him, because he says that he has once before this time been put in jeopardy.' * * * To the first plea the State took issue, and demurred to the second plea. The court below sustained the demurrer to the defendant's second plea, to which ruling of the court the defendant excepted."

In delivering the opinion of the court, Wilshire, J., says:

"There seems to be a conflict in the authorities as to when the jeopardy attaches. Under the provisions of the constitutions of some of the States, their courts hold that the jeopardy attaches from the moment when the defendant having pleaded to the indictment, and a traverse jury is empaneled and sworn to try the cause, in short, when the tribunal is complete in itself to try the cause, and the defendant properly before it, defending, having answered, while the courts of some other States incline to the opinion that the jeopardy of the Constitution begins only with a verdict rendered."

After stating various authorities, and quoting from 1 Bishop's Criminal Law, he concludes:

"Entertaining the views above expressed, we think the true rule to be that, whenever the accused has been arraigned, a jury empaneled and sworn, and the cause given them in charge, as was in this case, and there being no objection interposed by the accused to the indictment or the other proceedings, we will presume that he was demanding his constitutional right to a speedy and public trial, by an impartial jury of his country, etc., and the indictment being sufficient, as we have seen, and there appearing by the record to be no other reason for dismissing the indictment than insufficiency, the court would not deny the defendant the right to a speedy and impartial trial by dismissing the indictment. The dismissal of the indictment in this case, we think, under the circumstances, operated as an acquittal of the defendant."

(10.)

CALIFORNIA.

The case of People *vs.* Hunckeler, 1 Hawley's Crim. Rep., p. 507, (48 Cal., 331,) was an indictment for murder. The defendant "pleaded a former acquittal, former jeopardy, and not guilty." It appears that on the 15th day of December, 1873, the defendant was arraigned. In January, 1874, "he was placed upon his trial for manslaughter before a jury

duly impaneled and sworn, and that, after the witnesses for the prosecution and defence had been sworn and examined, the court, without the consent of the defendant, on motion of the district attorney, discharged the jury and remanded the defendant to the custody of the sheriff, so that an indictment might be found for a higher crime." The indictment was subsequently found. The question in the appellate court was simply whether the discharge of the jury operated as an acquittal.

McKINSTRY, J., in delivering the opinion of the court, said:

"'No person shall be subject to be twice put in jeopardy for the same offense.'—Const., Art. 1, Sec. 8.

"This language is more than the equivalent of 'no person shall be twice tried for the same offense.' 1 Bish. Cr. Law, 1018, 5th ed. A defendant is placed in apparent jeopardy when he is placed on trial before a competent court and a jury impaneled and sworn. His jeopardy is real, unless it shall subsequently appear that a verdict could never have been rendered by reason of the death or illness of the judge or a juryman, or that after due deliberation the jury could not agree, or by reason of some other like overruling necessity which compels their discharge without the consent of the defendant. People *vs.* Webb, 38 Cal., 467, and cases there cited. And when a person has been placed in actual jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject. 1 Bish. Cr. Law, 1206, 5th ed. Once in actual jeopardy a defendant becomes entitled to a verdict which may constitute a bar to a new prosecution, and he cannot be deprived of his right to a verdict by *nolle prosequi* entered by the prosecuting officer, or by a discharge of the jury and continuance of the cause. Cooley Const. Lim., 327.

"A person cannot be twice in jeopardy for the same offense; but, in the cases to which we have referred, the happening of the subsequent event which renders the discharge of the jury necessary, shows that the defendant has never been in actual jeopardy.

"In the case before us, however, it is not pretended that a verdict could not have been rendered at the first trial. The mere opinion of the district judge that the evidence showed

the defendant to be guilty of a higher degree of crime, was not such a necessity as required the discharge of the jury, or authorized a retrial of the defendant for the same offense.

"Judgment reversed and cause remanded, with direction to discharge the defendant."

The case of People *vs.* Cage, 17 American Reports, p. 436, (48 Cal., 323,) was an indictment for murder. The opinion was delivered by Niles, J., who said:

"The leading question made upon the appeal relates to the legal effect of the proceedings had at a former trial of the cause in the same court, at the June term, 1872. These proceedings, as shown by the bill of exceptions, were as follows: The case was regularly brought on for trial at that term. A jury was duly impaneled and sworn; evidence was introduced, and the case was submitted to the jury on the 30th of July. The jury remained together until the evening of the 2d of August. The proceedings of that day, so far as they pertain to the question before us, are shown by the following extract from the minutes of the court:

"'In this cause, counsel for the defense having been called, and appearing (counsel for plaintiff failing to answer) in open court the court ordered the sheriff to proceed to the door of the jury-room, where the jury in this case were under deliberation, and inquire of them if they had agreed upon a verdict, to which they replied that they "had not, and could not agree on a verdict,' and the sheriff thereupon reported their said reply to the court. Whereupon the court was ordered to be adjourned for the term, and the same was accordingly done by the sheriff.'

"The term would not have expired by operation of law until the evening of the ensuing day."

After citing 1 Bish. Cr. Law, § 873, he continues:

"These views are fully justified by the authorities cited in their support; and the conclusions cannot well be avoided. We are of the opinion that the discharge of the jury at the first trial of this cause was equivalent to a verdict of acquittal."

FROM THESE AUTHORITIES, BOTH TEXT-BOOKS AND ADJUDICATIONS, FEDERAL AND STATE, WHICH MIGHT BE GREATLY AND INDEFINITELY ENLARGED, IT IS MANIFEST—

1. That the Constitution prohibits not only a second trial, in its fulness and completeness, but also the placing of an individual in a position where such trial can possibly take place.

2. That the provision of the Constitution against a second trial, while it includes the common-law maxim that no one shall be twice vexed or placed in a position of jeopardy, is broader and more comprehensive, and includes any mere judicial act which might lead to the second trial, by which a party might be more than once endangered for the same matter.

3. That this distinction and extension of the maxim against dual trials, as well as the maxim itself, should be construed strictly in favor of the citizen, and not in favor of the Government, and that this true rule of construction can only exist by maintaining the maxim in its most extended and comprehensive form.

4. That a strict adherence to the original maxim and principles, especially in cases of life and limb, would prevent a discharge of the jury without a verdict.

5. That the discharge of the jury, or departure from the strictness of the maxim, can only take place in cases of extreme necessity—moral, intellectual, or physical—and that a discharge of the jury in the absence of such a cause is equivalent to an acquittal.

6. That the reason for a discharge must appear in the proceedings of the court, so that it may clearly appear that it was sufficient to justify its action in discharging the jury without a verdict, and that if this does not appear there cannot be a second trial, or so much as an attempt to carry on a second trial, if the jury has been discharged without a verdict.

THE ONLY GROUNDS UPON WHICH, IN ANY VIEW OF THE IMPORT OF THE CONSTITUTIONAL PROVISION, A JURY CAN BE DISCHARGED WITHOUT A VERDICT AND THE ACCUSED BE A SECOND TIME PLACED ON TRIAL.

In considering the grounds upon which a jury may be discharged without rendering a verdict, and at the same time allowing one accused of crime to be afterwards placed on trial, it is of the first importance to remember, that the established maxim and general principle is sternly against a discharge. This maxim or principle, intended for the protection of the "subject," or citizen, has never been obliterated from the law. It is deeply and ineffaceably impressed upon the Constitution. It can be torn out or effaced by no hand. It cannot be weakened or destroyed by any construction, nor, indeed, as has been expressly determined, by any legislative act. Hence, the exceptions which have been engrafted upon it must be of no ordinary character, but inevitable and controlling in their nature. The maxim and principle—the sacred provision of the Constitution—can bend or give way only to that which is supremely imperative and absolutely necessary. This will appear in two distinct classes: 1. From the decisions which have been cited. 2. From those which may be introduced to support the alleged power of a court to discharge according to its own conceptions and volitions.

I.—THE FIRST CLASS.

1. In the case of United States *vs.* Haskell and Francois, 4 Wash., C. C., 402, *supra*, Mr. Justice Washington, in delivering the opinion of the court, says:

"As to the question whether the court was authorized to discharge the jury on account of the insanity of one of the jurymen, we entertain no doubt. We entirely concur in the opinion of the supreme court of this State, in Cook's case, that the court OUGHT NOT *to discharge the jury* MERELY *upon the ground that the jury say they cannot agree, however posi-*

tice the declaration may be. But that they are fully authorized to discharge in cases of NECESSITY, and that whether the offense be capital or a mere misdemeanor; as if the jury are so EXHAUSTED as not to be able to continue their deliberations; where the prisoner has tampered with some of the jury, or has contrived to keep back the witnesses for the prosecution; if the prisoner, on her trial, becomes insane, is taken in labor, &c.; where one of the jurymen falls down in a fit and is unable to proceed on his duty, or is found to be insane; if a juryman, after the jury had left the bar, went out of town; intoxication of one of the jurors, rendering him incapable of performing his duty. Other cases of NECESSITY to authorize a discharge of the jury might be mentioned, but it is deemed unnecessary."

2. In the case of the United States *vs.* Watson, 3 Benedict, 1, *supra*, Blatchford, J., says:

"If the court may exercise this authority in a criminal case, without the consent of the defendant, in a case of manifest necessity, it may do so with the consent of the defendant, in a case which falls short of being one of manifest necessity. * * * The court must be governed as to the facts in this matter by its minutes. * * * The question then recurs whether the reasons assigned in the minutes of the court for withdrawing a juror shows a manifest necessity for doing so, or that the ends of public justice would otherwise have been defeated. * * * The mere illness of the District Attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no ground upon which, in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury, without the consent of the defendant, after the jury has been sworn and the trial has thus commenced. To admit the propriety of the exercise of the discretion would be to throw open the door for the indulgence of caprice and partiality by the court to the possible and probable prejudice of the defendants. When the trial of an indictment has been commenced by the swearing of the jury the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a

legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper."

3. In The United States *vs.* Andrew Shoemaker, 2 McLean, 114, *supra*, the court say:

"The discharge of a jury in a criminal case, *on the ground of a necessity which could neither be foreseen nor controlled*, imposes no hardship on the defendant of which he has a right to complain. He, alike with the Government, must submit to the law of necessity, which, of all other laws, is the most inexorable.

"But the entry of a *nolle prosequi* is imposed by no necessity. It may be a matter of discretion, or of policy; a discretion founded upon no fixed principle or guided by no known rule; or a policy which may have for its object the oppression and conviction of the defendant. * * *

"The prisoner stands charged as a culprit, but the law is jealous of his rights and shields him from oppression. However guilty he may be, he can be convicted only according to law. And a jury having been sworn to try his case, he has a right to their verdict, *unless some inevitable occurrence shall interpose and prevent the rendition of a verdict.*"

4. In the case of Klock *vs.* The People, 2 Parker's Crim. Rep., 676, *supra*, it is said that the jury can only be discharged, so as to enable the court to enter upon a second trial, "by some necessity or by some improper and fraudulent act of the accused," and cases are cited, among others People *vs.* Goodwin, 18 J. R., 187, in which Spencer, Ch. J., held that the power to discharge existed "in cases of *extreme and absolute necessity.*"

5. In Grant *vs.* The People, 4 Parker's Crim. Rep., 527, *supra*, the court say:

"The law, to warrant the discharge of the jury, must be one of uncontrollable emergency."

6. In the case of People *vs.* Barrett, 2 Caines, 304, *supra*, the power of the court to discharge a jury without its op-

erating as an acquittal, it is said, should be "confined as much as may be to cases of very urgent necessity, where, by the act of God, or by some sudden and unforeseen accident, it is impossible to proceed without manifest injustice to the public, or the defendant himself." And, it is added, that to discharge a jury otherwise "would be liable to great abuse and oppression."

7. In the case of Commonwealth *vs.* Cook, 6 Serg. & R., 577, *supra*, Tilghman, C. J., says:

"if the proceedings of the court can be supported, then it must be on the principle of necessity. And it is contended that upon this ground it may be supported, because when the jury are so exhausted as not to be able to continue their deliberations, they must either be discharged or perish. If that were the alternative no doubt they ought to be discharged; but I cannot perceive any such necessity on this record, although the court appears to have recorded very fairly all the circumstances of the case."

And Duncan, J., in referring to the exceptions to the maxim or principle against a double trial, says:

"What is the nature of these exceptions? It is either where the discharge is by his consent and for his benefit, or where ill practices have been used, or where he is insane, or becomes suddenly ill, so that, by the providence of God, he is rendered totally incapable of speaking for himself, or instructing others to speak for him, or where a juror or witness is suddenly taken ill. These last are cases of *positive, absolute, and extreme necessity; visitations of God, which are exceptions to all rules*, or where it is on account of the misbehavior of a juror who has absconded, or is incapable to perform the duties of one by reason of intoxication. These, and a variety of cases falling within the same reason, will fall within the exceptions difficult to define, but which all produce the same effect; *the impossibility of proceeding with the trial with justice to the prisoner or to the State, cases under very extraordinary and striking circumstances, as Judge Story expresses it.*

"But the present question is whether, in a case of life, the court can discharge the jury after the case is closed and the

jury retired to consider their verdict, solely because they come into court and declare they cannot agree, and that there is not the least probability they ever will, not only without the consent, but against the consent, of the prisoner, and this is the general question on which I give an opinion.

"The discharge of a jury for this reason is not one of those *unforseen casualties* which could not be defined, and therefore could not have been provided for. It is an occurrence which frequently must arise, and if the court possesses the power there would be no want of precedents, and a principle so very important in the administration of justice would have been found in every essay on criminal law, and would not, at this day, have depended on the doctrine of undefined necessity, a doctrine abhorrent to the common law, which delights in certainty, and leaves as little as possible to the discretion of judges, the most dangerous and tremendous of powers; and I do not hazard contradiction when I say this power never was exercised in England but once, and that with the consent of the prisoners, and this was *Mansell's Case*, in the reign of Elizabeth, 1 And., 103. That case has formed no precedent, and has never been mentioned but to be condemned. In *Kinlock's Case*, Fost. Cr. L., 29, it was decided not to be law by the ten judges assembled to consider this general power of the court to discharge jurors in capital cases. * * * The positive, absolute, and extreme cases forming the exceptions to the general rule, the circumstances and casualties showing the impossibility of proceeding in the trial, are capable of proof; dut the distant, imaginary, and possible contingencies that may arise to the health of the jurors by keeping them together are matters of mere conjecture. It is said, is a juror to be compelled by hunger to give a verdict contrary to his judgment? Such an extreme case has never occurred. When an extreme case does occur it will be time enough for the court to decide on it. This record states no allegation of any juror being affected in his health or ready to perish by hunger; but the jury was discharged solely on their declaration that they could not agree, and that there was not the least probability they ever would. I am of opinion, therefore, that the court had not authority to discharge the jury for this reason without and against the consent of the prisoners, and that this discharge amounted to an acquittal."

8. In the case of McFadden *vs.* The Commonwealth, 23 Penn. St., 12, *supra*, the court say:

"A discharge of a jury in a capital case after the trial has begun is not a continuance of the cause. It is the end of it. And for all purposes of future protection it is the same to the prisoner as an acquittal, *unless it was done with his own consent, or demanded by some overwhelming necessity; such, for instance, as the sickness or death of a juror.*"

9. In Commonwealth *vs.* Clue, 3 Rawle, 498, *supra*, the court say:

"The Commonwealth *vs.* Cook, then, establishes that the court may discharge the jury of a prisoner capitally indicted ONLY in a case of absolute necessity, to constitute which it is necessary that there be some other ingredient beside mere inability to agree."

And Gibson, C. J., then refers approvingly to the utterances of Tilghman, C. J., and Duncan, J., in the case of Commonwealth *vs.* Cook.

10. In the case of Williams *vs.* The Commonwealth, 2 Grattan, 567, *supra*, the court refers to some of the occurrences which would justify the discharge of the jury, such as the prisoner becoming suddenly ill and unable to attend to his defense, sickness of a juror, and other matters, and then adds:

"The accused is entitled to be tried by the jury he has selected in the first instance, unless there be some imperious necessity for their discharge."

11. In Nolan *vs.* State, 55 Ga., 521, *supra*, the court says:

"Only with his [the prisoner's] consent, or for some *legal necessity*, can the crisis be ended whilst the voice of his jury remain undeclared."

12. In the case of Bud Powell *vs.* The State, Chicago Legal News, July 26, 1884, *supra*, the court say:

"In the well-considered opinion in the case of Parchment *vs.* State, Presiding Judge Ector enunciates the law thus: 'We believe, after a careful examination of the authority,

that if the court had no jurisdiction of the cause, or if the indictment was so defective that no valid judgment could be rendered upon it, or if, by any regular necessity, the jury are discharged without a verdict—which might happen from the sickness or death of the judge of the court, or the inability of the jury to agree upon a verdict after sufficient deliberation and effort—or if the term of the court, as fixed by law, comes to an end before the trial is finished or the jury discharged with the consent of the defendant, expressed or implied, or if after verdict against accused it has been set aside on his motion for a new trial or in arrest of judgment, the accused may, in all such cases, again be put upon trial for the same facts charged against him, and the proceedings had will constitute no protection.'"

13. In Stewart *vs.* The State, 15 Ohio St., 155, *supra*, the court say, that the jury cannot be discharged "without an *absolute necessity therefor*. Such action taken without his consent would operate as an acquittal, and be a bar to any further or subsequent prosecution for the same offense."

14. In the case of O'Brian *vs.* Commonwealth, 9 Bush, Ky., 333, *supra*, the court say:

"The right of trial by jury is of but little value to the citizen in a criminal prosecution against him if this provision of the Constitution can be violated and the accused left without remedy."

And after referring approvingly to the cases of The Commonwealth *vs.* Cook, and The Commonwealth *vs.* Clue, the court quotes from the case of State *vs.* McKee, 1 Bail. (S. C.), 657, as follows:

"'We are enabled to say that a jury, after they are charged, can be discharged, and the prisoner tried a second time for the following causes only: 1. The consent of the prisoner. 2. Illness of one of the jury, prisoner, or the court. 3. Absence of one of the jurymen. 4. The impossibility of agreeing on a verdict.'"

And add that they "can only reaffirm the principle embodied in all the cases referred to, and which, in our opin-

ion, is also the doctrine of the common law, that every interference on the part of the State, after the jury has charge of the prisoner, by which the accused is prevented from having a verdict declaring his guilt or innocence, unless upon facts clearly establishing a case of necessity, or showing the prisoner's consent, must operate as an acquittal, and this is the only mode of preserving and maintaining the Constitutional provision on the subject."

15. In the case of Mahala *vs.* State, 10 Yerger, 532, *supra*, the court refer approvingly to The Commonwealth *vs.* Cook, and The Commonwealth *vs.* Clue; and referring to other cases, they say:

"These decisions made by the first tribunals of the country, completely sustain the position that the power to discharge a jury, without a verdict, is not the exercise of an arbitrary discretion, but an extremely delicate duty, only to be performed in cases of urgent necessity.

"This brings us to the examination of what constitutes this necessity. We are of opinion that the causes which create this necessity may be classed under three heads, viz: 1. Where the court is compelled by law to be adjourned before the jury can agree upon a verdict. 2. Where the prisoner, by his own misconduct, places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the State, or is himself, by the visitation of Providence, prevented from being able to attend to his trial. And, 3. Where there is no possibility for the jury to agree upon and return a verdict."

It is then added:

"A jury may not be able to agree upon a verdict for many reasons—such as sickness or insanity of one or more of the jurors, exhaustion of the jury before they have been able to come to a decision of the case, the absconding of one of the jurors without the consent of the court. These are cases put in the books, and, with others of like character, constitute what we will distinguish as cases of *physical impossibility*. A jury may also not be able to agree because their minds cannot come to the same conclusion from the facts submitted to their consideration;

this we would consider as a case of *moral impossibility;* and we are called upon to say whether it constitutes a necessity for the discharge of a jury before the time arrives when the court must adjourn. We think it does not." * * *

"There is no English decision, then, sustaining the position that the court has the power to discharge a jury because they cannot agree upon a verdict, unless there be some physical impossibility connected with it, and so we think is the spirit of all the American authorities when properly understood."

16. In People *vs.* Hunckeler, 48 Cal., 331, *supra*, the court say:

"His jeopardy is real, unless it shall subsequently appear that a verdict could never have been rendered by reason of the death or illness of the judge or a juryman, or that after due deliberation the jury could not agree, or by reason of some other like overruling necessity which compels their discharge without the consent of the defendant."

17. In People *vs.* Cage, 48 Cal., 323, *supra*, the same general doctrine will be found.

II.—The Second Class.

1. The case of The People *vs.* Olcott, 1 American Decisions, p. 168, (2 Johnson's Cases, 301,) was an indictment for conspiracy. He came before the court on a *habeas corpus*, on a motion that the prisoner should be discharged. The question in that case was as to the power of the court to discharge a jury on the ground of their inability to agree, without the consent of the prisoner. The court ordered a juror to be withdrawn, and the rest being called, and only eleven answering, they were discharged. The opinion was delivered in 1801 by Kent, J. After a review of various cases, the ground on which the discharge was justified, as enunciated by the court, was "*the furtherance of justice.*" This case was followed by People *vs.* Barrett, 2 Caines, 304, *supra*, which

was decided in 1805, when Kent was still a member of the court, and may be regarded as a more full and distinct utterance, in that early period, of the views of the court.

2. The case of People *vs.* Goodwin, 9 American Decisions, p. 203, (18 Johnson, 187,) was an indictment for manslaughter. The jury, after a trial of five days, had been out seventeen hours, and were discharged on the ground that they *were unable to agree, it being within half an hour of the legal termination of the session.* The discharge was set up against a subsequent trial, and a motion made to discharge the defendant. The case appears to have been carried up to the higher court by *certiorari.*

In the opinion delivered by Spencer, C. J., it is said:

"Upon full consideration, I am of opinion, although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of *extreme and absolute necessity*, and that it may be exercised without operating as an acquittal of the defendant; that it extends as well to felonies as misdemeanors, and that it exists and may discreetly be exercised in cases where the jury, from the length of time they have been considering a cause and their inability to agree, may be fairly presumed as never likely to agree, unless compelled so to do from the pressing calls of famine or bodily exhaustion." And it is said further: "I entirely concur in reprobating the proceeding of withdrawing a juror and attempting to subject a person to a second trial, because the public prosecutor was not prepared with his proofs. In the case of The People *vs.* Barrett, 2 Cai., 304, (2 Am. Dec., 239,) this court considered it equivalent to an acquittal."

3. In the case of United States *vs.* Coolidge, (2 Gallison, p. 364,) the indictment was for shipping on board of a vessel "fifty barrels of rye flour, with intent to transport the same to Halifax, during the war, contrary to the second section of the act of 6th of July, 1812, ch. 129. In the course of the trial William R. Lee, Jr., who was called as a witness on the part of the Government, declined taking the oath usually

administered to witnesses, but offered to affirm." Lee was finally committed for contempt. The district attorney thereupon "moved the court to discharge the jury, and that the cause should remain for trial at a future day." The motion was opposed.

STORY, J., says:

"The question is simply this: A party is on trial before a jury, and a circumstance occurs which will occasion a *total failure of justice* if the trial proceed; have the court, in such an *emergency*, power to withdraw a juror? * * * It is now held that the discretion exists in all cases, [*i. e.*, felonies and misdemeanors,] but is to be exercised *only in very extraordinary and striking circumstances.*" And he concludes: "Under these circumstances I am of opinion that the Government is not bound to proceed, but that the case be suspended until the close of the term, that we may see whether the witness will not consent to an examination." And this was done.

4. The case of The United States *vs.* Josef Perez, (9 Wheaton, p. 579,) does not differ from any of the authorities when properly considered. It came up to the supreme court from the circuit court for the southern district of New York upon a certificate of division. The prisoner "was put upon trial for a capital offence; and the *jury, being unable to agree*, were discharged by the court * * * without the consent of the prisoner, or of the attorney for the United States."

STORY, J., in delivering the opinion, says:

"The prisoner's counsel thereupon claimed his discharge as of right under these circumstances; and THIS forms the point upon which the judges were divided. The question, therefore, arises whether *the discharge* of the jury by the court from giving any verdict upon the indictment with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence. * * * We are of opinion that the FACTS, [*i. e*, the discharge of the jury upon the ground of their inability to agree,] constitute no legal bar to a future trial."

After referring simply to the fact that the prisoner had neither been convicted nor acquitted, and might again be put upon his defence, the court proceed thus:

"We think that in all *cases of this nature* [*i. e.*, where the jury is discharged because of inability to agree], the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated. * * * *To be sure, the former ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes;* and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. * * * We are aware that there is some diversity of opinion and practice on this subject in the American courts; but, after weighing the question with due deliberation, we are of opinion that SUCH a discharge [*i. e.*, where the jury was unable to agree], constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

The certificate then made was, "that, *under the circumstances stated in the record* [viz., the discharge of the jury on the ground of inability to agree], the prisoner, Josef Perez, is not entitled to be discharged from custody, and may again be put to trial, upon the indictment found against him, and pending in the said court."

It will thus be seen, from both classes of cases, that *nothing short of some absolute necessity, inevitable occurrence*, or *very striking circumstances*, will justify the discharge of a jury; and, if these do not exist, the discharge is unauthorized, unjustifiable, and must operate as an acquittal. There is no case of either class in which anything short of some inevitable occeurrence, or some imperious necessity, has been held sufficient to discharge the jury. It has never been pretended or claimed, in any case, that mere convenience of the court, the length of time which a case might consume in its trial, the order of business, or any merely incidental or tem-

porary consideration, could authorize the discharge; if so, the original maxim—the general principle—the provision of the Constitution—would be subjected to the mere arbitrary touch, or temporary expedient, or desires of the court. AND SURELY THIS CANNOT BE.

THE DISCHARGE OF A JURY IS NOT A MATTER OF MERE DISCRETION WHICH CANNOT BE REVIEWED BY THE HIGHER OR APPELLATE COURT.

The considerations which lead to the conclusion that the discharge of the jury cannot be the subject of an unreviewable and unappealable discretion, are numerous.

1. And the *first* arises out of the act itself. What is discretion? It is thus defined in *Bouvier's Law Dictionary*: "The equitable decision of what is just and proper under the circumstances." But there can be no determination strictly of that which "is just and proper under the circumstances," if the subject-matter of determination is one that is placed within fixed limits or settled definitions, by elementary principles, established maxims, or constitutional provisions. These exclude the idea of mere *discretion*.

2. As respects the discharge of a jury, *these limits exist* in the maxim that no one shall be twice vexed, or the general principle that prohibits an individual charged with crime from being twice placed in jeopardy, and by the distinct provisions of the Constitution. If the discretion of the court can control the discharge of a jury except in cases of absolute necessity, the maxims cited, and the constitutional provision become inoperative, and the mere will and opinion of the court is substituted for these. This view is strongly and unanswerably presented in the case of Commonwealth *vs.* Clue, 3 Rawle, 498, *supra*, by Gibson, C. J.:

"Why it should be thought that the citizen has no other assurance *than the arbitrary discretion* of the magistrate for the enforcement of the constitutional principle which protects him from being twice put in jeopardy of life or limb

for the same offence, I am at a loss to imagine. If discretion is to be called in, there can be no remedy for the most palpable abuse of it but an interposition of the power to pardon, which is obnoxious to the very same objection. Surely every right secured by the Constitution is guarded by sanctions more imperative. But in those States where the principle has no higher sanction than what is derived from the common law, it is nevertheless the birthright of the citizen, and, consequently, demandable as such. But a right which depends upon the will of the magistrate is essentially no right at all, and for this reason the common law abhors the exercise of a discretion in matters that may be subjected to fixed and definite rules. I take it, on grounds of reason as well as of authority, then, that a prisoner, of whom a jury have been discharged before verdict given, may, by pleading the circumstances in bar of another trial, appeal from the order of the court before which he stood to the highest tribunal in the land."

In the case of O'Brien *vs.* Commonwealth, 9 Bush, (Ky.) 333, *supra*, the court say:

"The right of trial by jury is of but little value to the citizen in a criminal prosecution against him if this provision of the Constitution can be violated and the accused left without remedy. If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the State demands or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is this boasted right? It will not do to say to the accused that his only protection is in the sound discretion of the judge, or in the responsibilities assumed by him in taking the oath of office."

And in People *vs.* Cage, 48 Cal., 323, *supra*, the court, in referring to the right to discharge the jury at any time, say:

"The right which the Constitution intends to assure to the accused when put upon trial—to either have a verdict rendered in his case or go free—would be made to depend upon the arbitrary discretion of the judge."

3. The fact that the various appellate courts have taken up and considered the grounds for the discharge of a jury, and reviewed the decisions of the inferior courts, is a fact which should be conclusive in itself. If this appellate power did not exist in relation to the discharge of the jury, why have the courts, in the numerous cases cited and others, heard arguments and made adjudications in relation to the discharge, and fixed the grounds, as far as possible, upon which it might be made? And this has been done alike in the Supreme Court of the United States as well as in the circuit and district courts and in the State courts; and few, if any, of the cases have even *intimated* that the discharge of a jury was a matter resting in absolute discretion and not reviewable. And if the discharge involves only a mere exercise of discretion, why has the action of the court below, indeed, in the majority of cases, been set aside, and the prisoner been discharged by order of the appellate court?

4. Besides, in even the cases which may be regarded as the strongest in favor of the pretension of the prosecution for a second trial after the discharge of the jury, it appears that the right of review is clearly maintained.

Thus, in People *vs.* Olcott, 2 Johnson's Cases, 301, *supra*, in which the opinion was delivered by Kent., J., it is said:

"In the present case I cannot say the discretion of the court was unduly exercised. The jury had been out a long time, and repeatedly came into court and received its information and advice. They at last returned a verdict, which, for the present, I will assume to be an imperfect one, on which no judgment could be given. They refused to give any other verdict, either general or special. In short, the jury, after being out from Saturday evening till the afternoon of the succeeding day, return and declare they cannot agree to give any legal verdict. The circumstances constituting a case proper for the discharge of a jury must be more accurately perceived and more justly felt by the court before whom the trial is had than by any other court. It must,

therefore, be a pretty clear case of an *abuse of discretion* to induce me to say the court below ought not to have discharged the jury. I am, therefore, of opinion, on the first point, that the defendant ought not to be discharged."

This opinion clearly establishes that there may be "an abuse of discretion," which would lead the court to declare that the jury should not be discharged, involving the consequence of an improper discharge.

In the case of Bud Powell *vs.* The State, *supra*, the court say:

"Under the *statute* (of Texas) above quoted, *if said statute be held constitutional*, the court is empowered with discretion to discharge a jury without the consent of the prisoner 'where they have been kept together for such time as to render it altogether improbable they can agree.' This discretion, then, must be *measured* by the time they are kept together, since the improbability that they will agree is made to depend upon the time."

And, after referring to the facts in the case, the court continues:

"Would three hours and a half be such a time as would necessarily render it altogether improbable that they could agree? We think not, and, so believing, are of opinion that *the court abused his discretion* in thus discharging the jury, to the injury of the defendant's rights."

In the case of State *vs.* Moor, 12 American Decisions, p. 541, (Walker, 134,) in which the discharge of a jury was maintained on the ground of necessity, the court say:

"But we are met by this objection: Suppose the court place it out of the power of the prisoner to answer by discharging the jury; then I will answer and say, if the discharge has taken place unadvisedly the cases controlling the undue exercise of such a power will protect him, and the court will, in all such cases, be compelled to consider his answer as full and perfect, upon a plea of *autrefois acquit*."

In the case of United States *vs.* O. Watson, 3 Benedict, 1, *supra*, Justice Blatchford says:

"The mere illness of the district attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no ground upon which, in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury without the consent of the defendant, after the jury has been sworn and the trial has thus commenced. To admit the propriety of the exercise of the discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendants."

5. Moreover, it is an elementary maxim of the law that as little discretion as possible should be confided to the judges. This is thus expressed in Broom's Legal Maxims, p. *60: "It is, moreover, a principle consonant to the spirit of our Constitution, and which may constantly be traced as pervading the whole body of our jurisprudence, that *optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi*—that system of law is best which confides as little as possible to the discretion of the judge; that judge the best who relies as little as possible on his own opinion." And in his note, he quotes the maxim: *Discretio est discernere* [*scire*] *per legem quid sit justum*, 10 Co., 140. "Discretion is to know, through law, what is just."

In the case of Wilson *vs.* Rastall, 4 T. R., 753, Lord Kenyon says that discretion would be "best exercised by not deviating from the rules laid down by our predecessors; for the practice of the court forms the law of the court;" and in the case of Rex *vs.* Wilkes, 4 Burr., 2539, Lord Mansfield says:

"Discretion, when applied to a court of justice, means *sound* discretion, *guided* by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular."

6. Wharton, in his Criminal Pleading and Practice, § 508, presents this view:

"It is submitted, in conclusion, that the two classes of opinions which have been the subject of discussion may be reconciled, should it be conceded that the 'discretion,' in exercise of which a court, when intrusted with it, is justified in discharging a prisoner, must be a 'legal necessity,' such as would, if spread on the record, enable a court of error to say that the discharge was correct. The cases are clear that the term 'legal necessity' is not confined to cases such as death, &c., when the discharge becomes inevitable."

And Story, in United States *vs.* Coolidge, 2 Gall., 364, *supra*, says:

"In disdemeanors there is certainly a larger discretion, and, until the cases just mentioned, capital trials were generally supposed to be excepted. It is now held that the discretion exists in all cases, BUT *is to be* EXERCISED *only in very extraordinary and striking circumstances.*"

That is, it is not an uncontrollable discretion and one that can be arbitrarily, hastily, unduly, and unreviewably exercised.

7. It is not to be denied that in a few cases involving the consideration of the right of a court to discharge the jury, there may be intimations that it is not the subject of review; but these will be found to be mere incidental expressions.

The case of United States *vs.* Robert Morris, in 1 Curtis C. C., p. 23, was not a case which strictly involved a consideration of the discharge of a jury on the ground of any necessity, but the interpretation of an act of Congress allowing of the transmission of a case from the district to the circuit courts. In that case the defendant was indicted for a misdemeanor, and a jury was impaneled and sworn, when the district attorney introduced evidence "tending to show that one of the jurors had a bias in the case."

The court heard the evidence against the objection of the

defendant, and ordered the juror to be withdrawn and the case continued until the next term, without the consent of the defendant. At that term the judge of the court ordered the indictment to be remitted to the circuit court, on the ground that "difficult and important questions of law were involved in the case." The defendant set up these facts in his special plea, and alleged that he ought not to be required to plead to the indictment in the circuit court; that he ought not to be tried on it, and that the court ought not to take further cognizance of it.

The transmission from one court to the other was made under an act of Congress, of August 8, 1846, which constitutes section 1038 of the Revised Statutes, and which provided that the district court might remit to the circuit court any indictment pending in the district court, "when, in the opinion of the court, difficult and important questions of law are involved in the case, and the proceedings thereupon shall thereafter be the same in the circuit court as if such indictment had been originally found and presented therein."

(1.) The question therein chiefly discussed and passed upon by Mr. Justice Curtis was in relation to the transmission of the case from the district to the circuit court. The greater portion of the decision is devoted to the consideration of the act of Congress; and it is held, in substance, that the sending of the case to the circuit court, instead of diminishing the rights of the defendant, increased them, inasmuch as it gave to the defendant the advantage of the opinion of several judges with regard to any questions of complicated law that might arise, as well as a hearing in the Supreme Court of the United States, if the judges should be divided in opinion.

And (2) in reference to that part of the plea based on the withdrawal of a jury and the discharge of the panel, Justice Curtis holds that the act of the court was proper in the *fur-*

therance of justice, because it appeared that a juror was entirely incompetent by reason of his bias. He says:

"The rule of the common law, as shown by the authorities cited by the defendant's counsel, is, that neither party has a right of challenge after the juror is sworn, for cause then existing. But it by no means follows that it *is not in the power of the court, at the suggestion of one of the parties, or upon its own motion, to interpose and withdraw from the panel a juror utterly unfit, in the apprehension of every honest man, to remain there.*"

And he adds:

"The truth is, that it is an entire mistake to confound *this discretionary* authority of the court to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that, in a court of justice, either party can base a vested right to a corrupt or prejudiced juror who is not fit to sit in judgment in the case. I hazard nothing in saying that *no such right* is known to the common law. *This* disposes of the *other allegations* in the plea, that the case was taken from the jury and continued *without necessity*, for, in the language of the supreme court, already cited, if there is no necessity, strictly speaking, yet if, in the opinion of the court, taking all the circumstances in consideration, *the ends of public justice would otherwise be defeated*, then even a capital case may be taken from a jury and *a fortiori* may be a case of misdemeanor. * * The FINDING of a cause for withdrawing a juror, or taking a case from a jury, is a judicial act; the authority to do it is intrusted by law to *that* court, and no other court can revise its decision."

It will be observed, first, that he does not intimate that there is any power for the withdrawal of a juror *except* when it is *necessary*, or when it is *required by the interests of public justice* to do so—a form or cause of necessity; and, in this respect, does not essentially differ from other cases. The court *did find*, upon an examination of witnesses, that the juror was corrupt and biased, and the finding of this fact—the right to do so and its effect, was the only question passed

upon by Mr. Justice Curtis, and which, he says, is intrusted to the court. But he does not intimate that in the absence of any such cause, regularly declared and found by the court, there could be a discharge of a jury which would not be one open to review; or, to be more pertinent, that the discharge for reasons which involved no *necessity*, but only those of *convenience* to the court, or *accommodation*, or which had reference to the length of time that might be involved in the trial, could be justified or maintained in a higher tribunal on the ground of discretion.

It will be observed, further, that, in the entire extent of the opinion, Mr. Justice Curtis does not so much as once refer to the constitutional provision prohibiting a party from being twice placed in jeopardy; nor will it, perhaps, be contended for a moment that he intended to lay down the proposition that any or every act of an inferior tribunal in relation to the impaneling and discharge of juries was a mere subject of discretion, which could not be looked into by an appellate court. If so, the decision is in conflict with nearly all other cases, stands in this respect almost entirely alone, and is in direct antagonism with the exercise of judicial discretion, as defined and declared by Lord Mansfield, in the words already cited, in the case of Rex *vs.* Wilkes: "Discretion, when applied to a court of justice, means *sound* discretion, guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular."

It perhaps should be added that this case rests exclusively upon the *dictum* of Mr. Justice Curtis, and does not appear to have the sanction of any one else; and it is certain that the cases to which he refers in support of his position do not sustain it. The case of The Phil. & Trenton R. R. Co. *vs.* Stimpson, 14 Peters, 448, was a civil case, and the only exercise of discretion sustained in that case by the opinion of the court, delivered by Story, was as to "the mode of conducting trials, the order of introducing evidence, and the times when

it is to be introduced," which are stated to be "matters belonging to the practice of the circuit courts, with which this [the Supreme] court ought not to interfere, unless it shall choose to prescribe some fixed, general rules on the subject, under the authority of the act of Congress." And it is exclusively in reference to the introduction of evidence that the court state: "It seems to us, therefore, that all courts ought to be, as indeed, they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administration of justice to suitors; and we think that the circuit courts possess this discretion in as ample a manner as other judicial tribunals. We do not feel at liberty, therefore, to interfere with the exercise of THIS discretion; and, indeed, if we were called upon to say upon the present record whether this discretion was, in fact, misapplied or not, we should be prepared to say that we see no reason to doubt that it was, under all the circumstances, wisely and properly exercised. It is sufficient for us, however, that it [the admission of evidence] was a matter of discretion and practice, in respect to which we possess no authority to revise the decision of the circuit court."

The case of Grignon's Lessee *vs.* Astor, 2 Howard, 319, involved only a question of jurisdiction and not one of discretion, and the difference is drawn in the decision between a court of limited jurisdiction and one of general jurisdiction—or, to use the language of the court, "the true line of distinction between courts whose decisions are conclusive if not removed to an appellate court and those whose proceedings are nullities if their jurisdiction does not appear on their face;" and it is said that "a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate

power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities."

The third reference of Mr. Justice Curtis is to the case of United States *vs.* Haskell, 4 Wash. R., 402, *supra*, in which the jury were discharged because they could not agree, and because of the insanity of one of the jurymen. But in that case Mr. Justice Washington distinctly stated, as has already been shown, "By reprobating this plea we do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal, since he may have all the benefit of the error, if committed, by a motion for his discharge, or upon a motion in arrest of judgment."

It will thus be found that the cases to which Mr. Justice Curtis refers to sustain his position fail to do so.

8. The Revised Statutes creating the Supreme Court of the District of Columbia expressly provide (§ 772) that "Any party aggrieved by any order, judgment, or decree made or pronounced at any special term, may, if the same involve the merits of the action or *proceeding*, appeal therefrom to the general term of the Supreme Court, and upon such appeal the general term shall review such order, judgment, or decree, and affirm, reverse, or modify the same, as shall be just." The order discharging the jury (as well as that in relation to the consolidation of the cases) involved inevitably the entire merits of the case. The jury had been sworn to well and truly try, and true deliverance make, between the government and the defendant, and a true verdict give according to the evidence.

9. And why should the discharge of the jury, involving as it does the most grave consequences to one accused of

crime, be regarded as nothing else than a LEGAL discretion one to be laid open to the glance, examination, and control of the appellate court? Why should any question, involving anything else than the mere FORMS of trial, (or its necessary machinery,) be withheld from the consideration of the higher court? Why should the destiny of any citizen be placed in the hands of any one of a number of judges, and withheld from their careful consideration? If there cannot be a review except on mere questions of law, mere errors in the rulings, or in relation to the admission of evidence and the instructions to the jury, what may NOT be done?

10. Nor will it do to rely wholly upon the integrity and ability of the court. "In the state of purity and independence," says Chief Justice Tilghman, in the case of Commonwealth *vs.* Cook, "in which I verily believe the judiciary of the several States, as well as of the United States, at present stands, there might be no danger of oppression from its enjoyment of a very large discretionary power as to the discharge of juries. But other times may come in which other judges might abuse their discretion."

THE PRINCIPLES AND DECISIONS APPLIED TO THE PRESENT CASE.

If the discretion which can be exercised in relation to the discharge of a jury must rest on some of the various grounds of necessity which have been recognized in the text-books and decisions cited, if it must have something else as a foundation than mere convenience or accommodation of the prosecuting officer or the court, it follows that the discharge of the jury in the present case was eminently improper and unjustifiable:

FIRST. It rested upon none of the various recognized grounds authoritatively mentioned. There was no failure of the jury to agree, for they were not permitted to go to the

extent of attempting it. There was no sickness of judge or jury. There was no insanity on the part of any juryman, or drunkenness. The term of the court had not expired, nor could it, as the act of Congress provided for an extension for the purpose of carrying on an unfinished trial. There were no facts which it became necessary for the court to examine and pass upon in relation to any of the jury or the defendant, or anything else. It did not do so. It simply and suddenly conceived the idea that the trial of the case, in its consolidated form, would take a long time—not exceeding a month—and, upon this sudden determination, formed exclusively from the *ex parte* opening of the attorney of the United States, disputed as it was by the attorneys of the defense, the decision was made and the jury discharged.

SECOND. Nor was this all. Not only was the jury, exclusively for this reason, discharged against the objections of the defendant, but the previous order of the court, consolidating the cases, was at once and without consideration or argument rescinded. The entire condition of the case was precipitately changed.

THIRD. And immediately, without any opportunity given the defence for consideration or consultation, or to challenge or object to any of the jurors, the court *directed and required* them to be resworn and the trial to proceed.

In the note "(*a*)" to p.* 295 of 2 Hale's Pleas of the Crown, it is said that where a first trial is broken up by the withdrawal of the one from sickness, or for any other reason, although the eleven may be retained, "the prisoner should be *offered* his challenges over again as to the eleven, the eleven should be sworn *de novo*, and the trial begin again," and for this, among other cases, Rex *vs.* Edwards, R. & R., 224; 3 Camp., 207; and 4 Taunt., 309, are referred to.

FOURTH. It is no answer to this to say that the jury had been previously accepted. Because, where the jury was re-

sworn, the *entire* case included in all the indictments had been presented by the district attorney in an extended opening address, and this fact alone may well have prompted the defendant (if the opportunity had been allowed) to have challenged the jury and to have desired one whose minds could not possibly have been affected by one-sided statements.

FIFTH. *In fine*, there is no case in text-books or in the decisions of the courts in England or in the United States where practise appears similar to what occurred in this case, nor can any authority be found to justify a discharge on the mere ground of the length of time that the case might consume in its trial, or on any other equally fleeting, vague, and unestablished reason. It reposes on no consideration of necessity, which alone has created exceptions to the maxim and constitutional provision against dual trials.

In the case of State *vs.* McGimsey, 30 American Reps., p. 90 (80 N. C., 377), in which the jury were discharged because it appeared probable that they could not agree upon a verdict, the court say:

"The expiration of the term was no ground for discharging the jury; for it is provided by statute that 'in case the term of a court shall expire while a trial for felony, etc., shall be in progress, and before judgment shall be given therein, the judge may continue the term as long as in his opinion it shall be necessary for the purposes of the case.'" And then, referring to the question of the discharge of the jury, they continue: "We think the ancient rule of the common law has been sufficiently relaxed by our predecessors, and we are unwilling to move a step further in the direction of discretion. We abide the law as we find it established, acting upon the principle of *stare decisis;* and governed by this principle, after a careful and deliberate consideration of this case, we are of the opinion that the state of facts set out in the record does not show the existence of a necessity for the discharge of the jury. In coming to this conclusion, we are aware that its effect may possibly be to turn loose a bad man upon society, but it is better in the administration of

the law there should be an occasional instance of violence even to the sense of public justice, than that a principle should be established which in times of civil commotion that may occur in the history of every country would serve as an engine of oppression in the hands of corrupt time-servers and irresponsible judges to crush the liberties of the citizen."

And in the case of Commonwealth *vs.* McCormick, 39 American Reports, p. 423 (130 Mass., 61), the court say:

"When a jury has been sworn to try the issue and the trial has been commenced, the jeopardy to which the defendant is exposed is held to have begun, and the prosecuting officer will not, pending the trial, when a verdict is demanded by the prisoner, be permitted to enter a *nolle prosequi* for the purpose of subjecting him to another trial for the same cause. Commonwealth *vs.* Scott, 121 Mass., 33; Commonwealth *vs.* Tuck, 20 Pick., 356; Commonwealth *vs.* Kimball, 7 Gray, 328. The Government chooses its own time, and cannot for its own convenience discontinue the proceedings and still hold the prisoner for trial. The principle is embodied in the common-law maxim that no man is to be brought into jeopardy more than once for the same offense. 4 Bl. Com., 335."

Then, after referring to United States *vs.* Perez, 9 Wheat., 579, and United States *vs.* Morris, 1 Curtis C. C., 23, as deciding that it is "a mistake to suppose that in a court of justice either party can have a vested right to a corrupt or prejudiced juror who is not fit to sit in judgment in the case," and that, therefore, a jury may be discharged for the furtherance of justice, the court add:

"It is *not contended* that this power is given to the court to *be exercised arbitrarily, or without good cause* to believe that interference *is necessary* to prevent great injustice to one side or the other. It is to be used alike for the protection of the public and for the security of the prisoner in his right to an impartial trial."

And here this protracted discussion of that part of the

fifth amendment of the Constitution which declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" may be brought to a close. And it is submitted that it is immaterial which of the two conflicting views of the Constitution be adopted, or whether the broad, comprehensive principles of the common law "lying back of the Constitution" be envoked. Neither, nor all, will sustain the discharge of a jury for reasons merely casual or incidental, or for purposes of convenience or accommodation. To be justified, there must appear on the minutes or records of the court, or among its files and papers, some "manifest necessity," or "urgent circumstance," or "very plain and obvious causes," or "very extraordinary and striking circumstances," or an "emergency" which would "occasion a total failure of justice." (STORY, J., in United States *vs.* Perez and United States *vs.* Coolidge.) In the *absence* of such reasons or considerations there can be no legal discharge of a jury, and a commenced trial must be carried on to its completion—a verdict; and if this is done, the accused cannot be "put on his trial" a second time. The unauthorized and improper discharge forbids it.

Nor should it be overlooked that in this case there was a demurrer by the United States, and that, too, at the instance of the presiding justice; so that there can be no dispute as to the fact that the court discharged the jury without any kind of necessity—mental, moral, physical, or judicial—requiring it.

And in this one fact lies the primary, and, in fact, complete, strength of the case of Benjamin F. Bigelow.

THE DISCHARGE OF THE JURY WAS NOT ONLY WITHOUT ANY SUFFICIENT REASON; BUT DIRECTLY CONTRARY TO SEC. 1024 OF THE REVISED STATUTES.

SEC. 1024, is in these words, viz:

"SEC. 1024. When there are several charges any person

for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

It was under this section that the court below consolidated the sixteen indictments against the defendant, which consolidation it rescinded on the 5th day of November, 1883.

1. There was no question that the several indictments were properly consolidated, including, as they did, "two or more acts or transactions of the same class of crimes or offenses," etc. Nor was any such pretension made at the time of the rescinding of the order of consolidation.

2. The consolidation, however, was more than proper. It was not a matter of volition—of discretion—but of absolute right and duty. The cited section of the Revised Statutes, it is true, contains, in connection with the contemplated consolidation of similar crimes or offenses, the term "*may*." It declares that such crimes, etc., "*may* be joined," and that "the court *may* order them to be united."

3. But it has been repeatedly and distinctly decided that "where power is given by statute to public officers, in permissive language, as that they '*may*, if deemed advisable,' do a certain thing; the language used will be regarded as peremptory where the public interest or individual rights require that it should be."

In the case of Supervisors *vs.* United States, *ex relatione*, 4 Wallace, 435, the Supreme Court of the United States, speaking, through Mr. Justice Swayne, says:

"That act (act of February 16th, 1863, of Illinois Legislature) declares that 'the board of supervisors under township

organization, in such counties as may be owing debts which their current revenue under existing laws is not sufficient to pay, may, *if deemed advisable*, levy a special tax,'" &c.

"The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language, '*may, if deemed advisable*,' which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument. * *

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language, WHENEVER THE PUBLIC INTEREST OR INDIVIDUAL RIGHTS CALL FOR ITS EXERCISE, the language, though permissive in form, is in fact peremptory. What they are empowered to do for a third person THE LAW REQUIRES shall be done. The power is given not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless.

"In ALL such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'"

And in arriving at this conclusion the court cite various authorities, among which are the following:

"In The King *vs.* The Inhabitants of Derby, there was an indictment against 'diverse inhabitants' for refusing to meet and make a rate to pay 'the constables' tax.' The defendants moved to quash the indictment, 'because they are not compellable, but the statute only says that *they may*, so that they have their election, and no coercion shall be.' The court held that '*may*,' in the case of a public officer, is tantamount to *shall*, and if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt.'

"In The King and Queen *vs.* Barlow there was an indictment upon the same statute, and the same objection was

taken. The court said: 'When a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*. Thus, 23 Hen. VI says the sheriff *may* take bail. This is construed he *shall*, for he is compellable to do so.'

"These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. *The rule they lay down is the settled law of both countries.*"

In the previous case of Mason *vs.* Fearson, (9 Howard, 248,) in the Supreme Court of the United States, the words it "shall be lawful" (*i. e.*, words conferring permission to do) are construed as mandatory. In laying down the rule for the construction of words of permission, the court say:

"Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third person."

Many other authorities might be cited; but it is unnecessary. The rule of construction, as authoritatively laid down by the Supreme Court of the United States, required the consolidation of the indictments. The act was not only intended for the benefit of the Government, to prevent an accumulation of fees, and to correct other evils, but also, and primarily, for the benefit of defendants, and to prevent them from being burdened and harassed by various indictments, which might be included in separate counts of one. It, in fact, secures a single trial, and does not leave an individual subjected to a multitude. It was, therefore, the duty of the court, under section 1024 of the Revised Statutes, to consolidate the various indictments, and to secure to the defendant a single trial. Its first act, that of consolidation, was proper and legal; the second act, that of rescission, was eminently improper and illegal, and, hence, there is not a single but a double error in the action of the court, and not only was the

jury discharged without any sufficient consideration, but, besides, the discharge was made in disregard of the provisions of the law requiring a consolidation of the various indictments. The result is that to-day fifteen indictments for offenses of the same class, and transactions substantially similar, lie open against the defendant, and he is liable, according to the views adopted by the court below, to fifteen trials, which may not take place until the expiration of the existing sentence if he is not released from it by the action of this court.

Certainly, it cannot be that the defendant is without relief from the irregular discharge of the order, and from the order exposing him to sixteen trials, made, as is contended, contrary to the provisions of the law!

THE SECOND QUESTION.

The second constitutional question involved in the case arises out of the provision of the fifth amendment, which declares that no one shall "be deprived of life, liberty, or property without due process of law."

This provision is intended to secure regularity, order, system, fairness in legal proceedings. It is a prohibition and guard against spasmodic, unusual, or irregular judicial action. It is more comprehensive than the first clause: *that*, is confined to one particular; *this*, is all-comprehensive and embraces the entire course of a trial.

By "due process of law" is meant "law in its regular course of administration through courts of justice."

Bouvier's Law Dict'y, phrase "Due Process of Law;" 3 Story Const., 264, 661; 13 N. Y., 378.

Murray's Lessee *et al. vs.* Hoboken Land and Imp. Co., 18 How., 280.

Walker *vs.* Sauvinet, 92 U. S., 93.

Webster, in his argument in the Dartmouth College Case, (4 Wheat., 518,) says:

"The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."

In 4 Wheat., 235, JOHNSON, J., says:

"As to the words from *Magna Charta* incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice."

Cooley, in his Constitutional Limitations, 441, says:

"Due process of law in each particular case means such an exercise of the power of the Government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Whenever there is a departure from the regular and established course or usage of courts in the trial of a case—unusual, extraordinary, impulsive proceedings, and disregard of constitutional provisions or established principles and maxims of the common law—there can be no legal trial, and, if not, an individual cannot be deprived of life or liberty.

If it be insisted and held that the provision of the Constitution which declares that no one shall be "twice put in jeopardy" requires the trial to be carried on to a verdict of acquittal or conviction in order to afford a protection, it does not follow that the trial in this case was constitutional or proper. Certainly it was not, to the extent that it departed from ordinary and regular practice and considerations and reasons influencing the discharge of a jury. Certainly it was not, to the extent to which, after the jury was discharged, it allowed no opportunity for challenging the jury which had been impressed by the special, labored, and

studied opening on behalf of the United States. Certainly it was not, to the extent that, after it had been proclaimed to the defendant by the order of the court that he should be tried on all the indictments, it reversed the order without notice and without opportunity to consider what should be his action in the suddenly-changed aspect of the case. Certainly it was not, if the construction presented of *section* 1024 *of the Revised Statutes* in relation to the consolidation of various indictments is correct; and, in this event, it was violative of a legislative enactment as well as of the constitutional provision which protects an individual from being deprived of life, liberty, or property, without due process of law.

Looking at the case in these various aspects and in reference to both Constitutional provisions, it is confidently submitted that the action of the court below in discharging the jury cannot be sustained or justified in this appellate tribunal.

In the case of The People *ex.* Superior Court of N. Y., 5 Wend., 114, it is said, in an able and exhaustive opinion delivered by SUTHERLAND, J.:

"No court has a right arbitrarily to change its established course of proceedings in relation to a particular case."

And it is further stated:

"What is meant by the court when they speak of the discretion of inferior tribunals, and say that they will not interfere with or attempt to coerce it, will be best ascertained by adverting to some of the cases in which that language has been used."

After citing various cases, the court proceed:

"These cases sufficiently indicate the nature of the discretion, the exercise of which by inferior tribunals or officers this court will not undertake to regulate or coerce. It is that discretion which is not and cannot be governed by any

fixed principles or rules. * * It is of cardinal importance that the rules and principles which regulate the proceedings and decisions of our courts should be uniform and stable. The security of the citizen is essentially increased whenever the territory of undefined discretion in any of the departments of our Government is circumscribed by the establishment of well-defined and clear principles."

Att'y for Benjamin F. Bigelow.

113-328

113-328

Supreme Court, District of Columbia.

IN THE GENERAL TERM.

UNITED STATES

vs.

BENJAMIN F. BIGELOW.

WILLIAM B. WEBB and ROBERT CHRISTY, of Counsel for Defendant.

BRIEF FOR DEFENDANT.

I.

The discussion is now limited to the question arising upon the construction to be given to the following language, contained in the Fifth Amendment to the Constitution of the United States: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, * * * nor be deprived of life, liberty, or property without due process of law."

The following is a brief statement of the facts of the case affecting this question:

Sixteen indictments were pending against the defendant in the criminal term, each charging embezzlement, and all growing out of his alleged misconduct as the receiving teller of the National Bank of the Republic of the city of Washington.

Upon motion of counsel for defendant, the justice holding the criminal term (June term, 1883) ordered all of the cases at that time pending to be consolidated. (Criminal Minutes, vol. 16, p. 437).

That this order of consolidation was deliberately made is evident from the fact that No. 14510, one of the same series of cases, the indictment in which was found subsequently to those embraced in the first order of consolidation, was upon the defendant pleading thereto, "included in the previous order of consolidation of the cases against said defendant." (Criminal Minutes, 16, p. 497).

The order of the court providing for the consolidation likewise embraced an additional order requiring counsel for the Government to furnish defendant with a bill of particulars; which bill of particulars was subsequently furnished with reference to the cases as consolidated, and the defendant thereafter prepared his defence with reference to these orders, relying upon their remaining undisturbed and unchanged, as he had a right to do.

This continued to be the attitude of these cases until the fifth day of November, when a jury was duly empanelled and sworn to try "the issue joined in the above cases" "consolidated by order of court," and the attorney of the United States opened the case, and made a full, elaborate, and minute statement of the facts which the Government expected to prove in support of all and each of the indictments against the defendant—not only to the members of the jury empanelled to try the case, but in the presence and hearing of the other jurors in attendance upon the court. And was thus enabled to lay before the jury many facts that would have been wholly incompetent had the defendant been on his trial upon a single indictment. Naturally, and necessarily, this resulted to the great prejudice and injury of the accused upon his final trial. For it will not be contended but that the members of this jury had been so fully informed of the facts of the cases, as claimed by the Government by

the opening address of counsel for the Government, as to render them incompetent to sit as jurors, if they had been presented as jurors at a prior or subsequent term of the court. They were not the impartial jurors provided for in the Constitution.

It was at this stage of the trial—and when the whole history of the accused involved in the many indictments had been impressed upon the minds of these jurors; and they no longer, as may be reasonably presumed, and as the law undoubtedly conclusively presumes, stood indifferently between the Government and the accused—that the improvident order was made, not only without the consent of the defendant, but against his solemn protest, "the order consolidating the cases to be tried as one be rescinded, and discharges the jury from further considering the cases as consolidated." (Criminal Minutes, p. 498.)

And thereupon, and without any delay, a jury was directed to try No. 14394 of the indictments, being one of the indictments embraced in the order of consolidation, and, notwithstanding the objections of the accused thereto, proceeded to try said indictment, whereupon the defendant interposed his plea of jeopardy, to which the Government demurred, and the court, sustaining the demurrer, the trial proceeded, and a verdict of guilty was ultimately rendered against the accused by a jury composed of the identical persons who had been sworn to try the indictments as consolidated, and had been fully instructed as to all the charges against the defendant by learned counsel representing the Government, as already stated.

It seems to us that there can be but one question, namely, whether the law permitted the court to direct the consolidation of the cases.

We submit with confidence that full and ample authority was conferred by section 1024 of the Revised Statutes, which reads as follows:

"When there are several charges against any person for

the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments the whole may be joined in one indictment, in separate counts, and if two or more indictments are found in such cases, the court may order them to be consolidated."

Our view is strengthened by section 980, which prohibits the District attorney from either unnecessarily harassing the accused or subjecting the Government to costs.

"When a district attorney prosecutes two or more indictments, suits or proceedings, which should be joined, he shall be paid but one bill of costs for all of them."

And confirmed by the following decisions giving construction to these statutes:

In the case of the United States *vs.* Timothy O'Callahan, 6th McLean's C. C., vol. 6, p. 596, the defendant's counsel moving to quash the indictment on the ground that it contained several charges of distinct offences, the Court held—

"In point of law there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender, and it is no ground of demurrer or arrest of judgment. * * * A count for embezzlement on the 39 George, 3, c. 35, may be joined with a count for a larceny on 2 George, 2, c. 25, because these offences are felonies."

"Yet, a late act of Congress has a bearing upon this question and settles it. In the first section of the act 'to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, etc., it is declared.' Here the court recites the section which subsequently became section 1024 of the Revised Statutes."

In the syllabus it is stated as follows:

"But a late act of Congress requires offences which may be joined to be included in the same indictment."

The court further says "the act of Congress referred to, with the view of saving costs, authorizes the charges as they are made, and if distinct indictments had been found on the separate charges, the act of Congress would authorize the court to consolidate them."

The words *shall* or *may*, when used in a statute, are imperative *only* when the public interests or rights are concerned.

Malcolm *vs.* Rodgers, 5 Cow., 188.

And the rule is general, that where a duty is imposed upon officers by statute, whether by words, which are peremptory in themselves, or merely permissive, they have no discretion to refuse its performance as against a party having an absolute interest in it.

Martin *vs.* Mayor, &c., 1 Hill, 545.

The last two cases are cited in the notes on pages 223 and 224, of Dwarris on Statutes & Constitutions.

We are therefore brought, as we think, irresistibly to the conclusion that the order of the court consolidating these cases was not only permitted but imperatively commanded by the statute, or certainly that when once made is was beyond the power of the court to recall or rescind it.

II.

The brief filed upon the former hearing of the cause before this honorable court, on behalf of the defendant, greatly lessens the labor of associate counsel, yet we deem it our duty, so profoundly are we impressed by the gravity of the case to our client, to submit additional authorities, and to present additional reasons to the court in his behalf.

We submit that the most distinguished writers upon criminal law and procedure fully sustain our view of the case, namely, that the plea of former jeopardy should be sustained.

In addition to Cooley's Const. Limitations, Cooley's Prin-

ciples of Constitutional Law, and Bishop Cr. Law, cited in the original brief, we beg leave to call the attention of the court to the following writers, most of whom are equally eminent in their profession:

"*The constitutional provision*, that no person shall be subject for the same offence to be *twice put in jeopardy of life or limb*, has been variously interpreted by different tribunals; for, while some have held that it means nothing more than the common law maxim, that no man shall be tried twice for the same offence, others have held that whenever the jury are charged with the prisoner, upon a good indictment, he is put in jeopardy, and that he cannot again be put on trial unless the verdict was prevented by the act of God, such as the sudden illness or death of a juror, or the illness of the prisoner, or by some other case of urgent and imperious necessity arising without the fault or neglect of the Government. Whether the impossibility of agreement of the jury, unless by the physical coercion of famine or exhaustion, constitutes such a case of urgent necessity, justifying the court, in the exercise of its discretion, to discharge the jury and hold the prisoner for a second trial, is also a point on which there has been much diversity of opinion; but the affirmative being held by the Supreme and circuit Courts of the United States, as well as by several of the State courts, may now be regarded as the better opinion."

Greenleaf's Evidence, vol. 3, sec. 37.

It will be observed that this eminent writer recognizes only the most imperious necessity as constituting the sufficient reason for discharge of the jury after they are empanelled and sworn.

"In an inferior court, if the jury will not agree on their verdict, the way is as in other courts, to keep them without meat, drink, fire or candle till they agree; and the steward may from time to time adjourn the court until such agreement. If they agree not before the departure of the justices of gaol-delivery into another county, the sheriff must send them along with them in carts, and the judge may take and record their verdict in a foreign county."

Bacon's Abridgment, vol. 3, p. 768, G.

And such was the law of England until a recent period, and the practice of its courts.

"A jury sworn and charged in case of life and member, cannot be discharged till they give a verdict. In civil cases it is otherwise, as where non-suits are had, &c., and sometimes when the evidence hath been heard, the parties doubting of the verdict do consent that the jury shall be drawn or discharged."

Jacob's Law Dictionary, referring to 1 Inst., 154–157.

The following sections from a work rapidly growing in favor with the courts, "Proffat on Jury Trials," will be found interesting and instructive:

§ 475. The oath administered to the bailiff in ancient times was, that the jury should be kept "without meat, drink, fire, or candle, until they were agreed." (3 Black. Com., 375.) When such a mode of compelling a verdict was practiced, it is no wonder that the discharge of the jury without a verdict was a rare occurrence, and that in criminal cases a discharge without a verdict was considered tantamount to an acquittal. The maxim "*nemo debit pro una et eadem causa bis vexari*," was adopted in our Constitution under the guarantee that "no one shall be twice put in *jeopardy* for the same offence."

§ 477. "On a trial for felony the jury should not be discharged at the discretion of the court." The judges adopted this rule because of the abuse of the power to discharge juries adopted by the courts in political trials.

§ 479. The right to discharge a jury in case of felony was doubted until lately in England. In cases of misdemeanor there was not the same strictness. Accordingly, we find that judges discharged the jury in trials for misdemeanors when after long confinement they failed to agree.

Lord Coke says, in 3 Inst., 110: "To speak it here, once for all, if any person be indicted of treason, of felony, or of larceny, and plead not guilty, and thereupon a jury is re-

turned and sworn, their verdict must be heard and they cannot be discharged, neither can the jury in those cases give a privy verdict, but ought to give their verdict openly in court."

A jury charged and sworn, in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict.

Coke on Littleton, § 366.

Holt used the following language (as reported by Ch. J. Eyre):

I have had occasion to consider of this matter: in criminal cases a juror cannot be withdrawn but by consent, and in capital cases it cannot be done even with consent.

The Two Kinlocks, Foster, 27.

§ 491. The inference is that the necessity, whatever it may be, must appear upon the record, and *it must be adjudged by the court from proper evidence*, that such necessity existed which made a discharge of the jury imperatively necessary. Hence, where it appeared that the necessity was not made apparent to the court, and was not properly adjudged to exist, and the jury were discharged, it was held that this was sufficient as a plea of *autrefois acquit* in a future trial of the same indictment.

The following definitions are found in that standard work, Bouvier's Law dictionary.

Jeopardy, Peril, Danger.

The situation of a person when a trial-jury is sworn and empanelled to try his case upon a valid indictment, and such jury has been charged with his deliverance.

This is the sense in which the term is used in the United States Constitution, "No person * * * shall be subject for the same offence to be twice put in jeopardy of life or

limb," U. S. Const., Art. V, Amend., and in the statutes or constitutions of most, if not all, of the States.

1 Bish. Crim. Law, § 650.

Discharge of a Jury.

The removal of a case from the consideration of a jury. In criminal cases this can only take place by consent of the prisoner. A number of cases cited in support.

A distinction has been taken in some cases between felonies and misdemeanors in this regard * * but is of doubtful validity.

Among cases of necessity which have been held sufficient to warrant the discharge of a jury, without releasing the prisoner, are: sickness of the judge; sickness or other incapacity of a juror; sickness of the prisoner; expiration of a term of court; inability of the jury to agree.

The following citations are from Phillips on Evidence, vol. 2, pp. 110, 111.

A *nolle prosequi* is no bar to another indictment, unless it *be after the jury are empanelled.*

> State *vs.* McKee, 1 Bail., 651, 653, 654, and the cases cited by O'Neal, J. Regularly that cannot be done after the jury are empanelled, it is said; but if they be discharged under the pretense of a *nolle prosequi*, it will be equivalent to an acquittal.

The discretion of the court to discharge the jury, and remand the prisoner for another trial, is a legal discretion, exercisable according to known rules. After the jury were empanelled for trial of a murder in killing a slave, the solicitor general was answered by the foreman, on inquiry, that he had declared he never would convict in such a case, whereupon the solicitor, with permission of the court, entered a *nolle prosequi*, and the jury were discharged. Held: a bar to a subsequent indictment.

State *vs.* KcKee, 1 Bail., 651, 652, 653.

The rule in Pennsylvania is still more strict. The discharge of the jury, so as to secure another trial, is allowed in a capital case especially, only when required by *absolute necessity*. Even the illness of any of the jury, arising from privation, if removable by food, and the prisoner consent that it should be supplied, is not an adequate cause of their discharge; and if discharged under such circumstances a new trial would be barred. Their inability to agree is not a proper cause of discharge.

Commonwealth *vs.* Clue, 3 Rawle, 498.
Commonwealth *vs.* Cook, 3 Rawle, 500.
S. C. Serg. & Rawle, 577.

The learned court admit a wide difference between their decisions and those of the neighboring States, but maintain their own ground with the argument that the constitutional right of the subject not to be put in jeopardy a second time ought not to depend on the arbitrary opinion of judges.

Idem, 591.

When Jeopardy Attaches.

Although there may have been no verdict, yet, if the cause were duly submitted to a jury upon a valid indictment, and the jury were discharged without the consent of the defendant for any cause short of imperious necessity, such as sickness of a juror, or of the judge, or the failure of the jury to agree upon a verdict after a reasonable time for consultation, such discharge operates as a bar to another trial; so if a juror be discharged for misconduct, or because he was on the grand jury that found the indictment, after the trial has commenced, he is entitled to his discharge. (9 Bush., 333.)

What Constitutes Previous Jeopardy.

The jeopardy commences when a jury is empanelled and sworn for the trial of the charge.

1 Bish. Cr. Law, 6th Ed., Sec's 1012, 1047.
State *vs.* Redman, 17 Iowa, 329.
Com. *vs.* Cook, 6 S. & R., 577.
McFadden *vs.* Com., 23 Penn. St. R., 12.
O'Brian *vs.* Com., 9 Bish., 333.
15 Amer. Rep., 715.
L. Maga., 27.
Weaver *vs.* The State (Ind.), 4 Crim.
1 Lead. Crim. Cases, 528.

In Conway and Lynch *vs.* The Queen, Easter Term, 1845, Queen's Bench, Ireland, it was held:

"In a capital case, in the absence of any fatality or evident necessity, a judge has no discretionary power of discharging a jury without their giving a verdict, because after a long deliberation they state they cannot agree.

It is no sufficient reason, *per se*, for their discharge, that, in the judge's opinion, more than a reasonable and sufficient time has elapsed to enable them, if they could at all, to agree.

Where the judge discharges a jury in such a case without their giving a verdict, the reasons which have induced him to consider it necessary so to do should be set out upon the record, in order to their being reviewed, if necessary, by a superior court.

1 Cox Criminal Cases, p. 210.

It is only in cases of inevitable necessity that a jury can be discharged without the consent of the defendant.

Wedderburn's case, Foster 22, q. 1.
Chitty's Cr. L., 632.

It is important to remember, in this connection, that such was the law in England when the protection upon which we rely was imbedded in our Constitution.

In general, it may be said that jeopardy begins when a trial-jury, upon a sufficient indictment in a court of competent jurisdiction, has been empanelled and sworn to try the case. (Bish. on Crim. Law, § 659, 2 Lead. Crim. Cas., 358.) But the *jeopardy* is not considered as attaching in such cases, although the jury has been sworn, if, during the trial, the presiding judge becomes so ill as to be unable to proceed.

Nugent *vs.* The State, 1.

4 Stew. & Port., 72.

Witherow & Stiles' Digest, Iowa Rep.

III.

The States generally seem to have adopted the following maxim in their tenderness of the life and liberty of their citizens, namely:

"The necessity of guarding the life and liberties of the people against the power of the Government has established the principle that the court cannot deprive the defendant in a criminal case of the benefit of a verdict of acquittal."

Wharton's Digest, Supplement.

And although this Court, as we well understand, will not feel itself controlled by the decisions of even the highest courts of the States, yet it will at the same time respect the reasoning that supports their decisions. We have therefore cited a number of decisions, which we deem strong supports to the position of the defendant in the present contention.

Alabama:

Where the jury has been empanelled and sworn and a sufficient indictment is read and pleaded to by the defendant, the discharge of the jury for any cause legally insufficient operates as an acquittal. (1870.)

Bell *vs.* The State, 44 Ala., 393.

The discharge of a jury in a case of felony without the consent of the accused, for the reason that all the business of the term, except the case on trial, is finished, and because the jury think it is not possible for them to agree on a verdict, is irregular and forbidden by law, and, on motion of the defendant, he shall be discharged. (1869.)

Exct. Vincent, 43 Ala., 402.

He was not put in a situation of legal jeopardy until the panel was full and all the jurors sworn well and truly to try the issue between him and the State, and a true verdict to render.

Mixon *vs.* The State, 55 Ala., 129.

Lee *vs.* The State, December Term, 1870.

Arkansas:

When Court may Discharge Jury.

It is competent for the court, when the jury cannot agree, to discharge them and hold the accused for trial, on the same indictment, by another jury; as, also, where a juror, in course of the trial, becomes so ill, or the prisoner becomes so sick, or in like cases of impossibility to proceed; but beyond this the authority of the court does not extend.

What Operates as an Acquittal.

Where the indictment is sufficient in form and substance, and the defendant is arraigned, pleads, and the jury is empanelled and sworn to try the issue, it is to be presumed that the defendant is demanding a speedy trial, and a dismissal of the indictment by the court, without the consent of the defendant, and holding him to answer another indictment for the same offense, operates as an acquittal.

Arkansas Reports, Vol. 26, p. 260.

California:

Where a prisoner has once been put on trial for manslaughter before a jury impanelled and sworn, and witnesses have been examined, he has been put in jeopardy, and if the judge, without the consent of the respondent, discharges the jury without submitting the case to them, this is a bar to any further prosecution for the same act, and he cannot afterwards be tried on an indictment for murder for the same killing.

American Crim. Rep., Hawley, Vol. 1, 507.
People *vs.* Hunckiler, 48 Cal., 331.

If a party is once placed upon his trial before a competent court and jury, upon a valid indictment, the "jeopardy" attaches, to which he cannot again be subjected, unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent; or, in case a verdict be rendered, it is set aside at his instance.

People *vs.* Webb, 38 Cal., 467.

In Cage *vs.* The People (48 Cal., 323), it was held that the discharge of a jury without sufficient cause operated as an acquittal, and the prisoner could properly plead it in bar of another trial for the same cause.

The supreme court of California has also held that the action of the court in discharging a jury in a criminal case could be reviewed by the appellate court.

Georgia:

The respondent was indicted for larceny, and, while being tried, a *nolle pros.* was entered on that indictment. He was then indicted for burglary in the same transaction, and to this indictment pleaded his former *jeopardy*. Held, that the plea was good, and a bar to further prosecution.

55 Ga., 625.
American Crim. Rep., Vol. 1, p. 510.

Indiana:

The court has no discretionary power to discharge the jury to whom the cause of the prisoner has been submitted; such discharge must result from a necessity determined by law, or it will release the prisoner.

Miller *v.* The State, 8 Ind., 325.

It is a settled law in this State that where a legal indictment has been returned by a competent grand jury to a court having jurisdiction of the person and the offence, and the defendant has pleaded, and a traverse jury has been duly empanelled and sworn, and all the preliminary requisites of record are ready for the trial, the prisoner has once been put in jeopardy.

Joy *vs.* The State, 14 Ind., 139.

See 7 Blackf., 191; 5 Ind., 292.

When the accused is put upon trial on a valid indictment before a legal jury, and the jury is discharged by the court without good cause, and without the consent of the defendant, he has incurred the first peril, and the discharge of the jury is equivalent to a verdict of not guilty.

State *vs.* Walker, 26 Ind., 346.

Discharge of jury in respondent's absence held a good plea in bar of further prosecution.

State *v.* Wilson, 58 Ind., 487.

Defendant was tried for murder; the jury disagreed, and in the absence of the defendant, were discharged by the court. *Held*, that a further prosecution of the defendant was debarred.

Wilson *vs.* The State, 50 Ind., 487.

(19 Amer. Reports, 719.)

Kentucky:

When one is on trial for murder before a jury sworn, etc., he is then in jeopardy, and every interference on the part of the State, after the jury has charge of the prisoner, preventing a verdict of guilt or innocence, unless upon facts clearly establishing a case of necessity, or showing his consent, must operate as an acquittal.

O'Brien *vs.* Com., 9 Bush., 334, (1872.)

The unnecessary discharge of one juror against the objection of the respondent, on trial for a felony, is a discharge of the whole jury, and a bar to further prosecution of the indictment.

Idem.

Maine:

The attorney general has the power to enter a *nolle prosequi* to the whole or any part of an indictment, without the consent of the prisoner, either before a jury is empanelled or after verdict. If after verdict, and the indictment is sufficient, it will be a bar to any new indictment for the same offence.

State *vs.* Smith, — Maine, 67, 328.

Michigan:

Where, upon a plea of former acquittal, a jury was empanelled, and evidence put in by the prosecution: *Held*, that the defendant was entitled to a verdict one way or the other; and if, in the absence of overruling necessity, the jury was discharged without having rendered a verdict, defendant was entitled to a final discharge.

People *vs.* Jones, 48 Mich., 5541.

Mississippi:

The premature discharge of the jury without right entitles the prisoner to an acquittal because of former *jeopardy*.

And, hence, when the judgment is reversed because the verdict was returned, and the jury discharged in the absence of the prisoner, the Supreme Court does not remand the case for a new trial, but orders the prisoner to be discharged.

Finch *vs.* The State, 53 M., 363.

A party is placed in *jeopardy* whenever, upon a valid indictment in a court of competent jurisdiction, and before a legally-constituted jury, his trial has been fairly entered upon.

Teat *vs.* The State, 53 M., 439.

North Carolina:

If the jury in a capital case separate without returning a verdict, the prisoner shall not be tried again for that offence.

State *vs.* Gavignes, 1 Hay, 241.

A jury when charged with a capital offence cannot be discharged without rendering a verdict, unless for some cause that human sagacity can neither foresee nor prevent. Therefore, where a jury were charged with the trial of a prisoner for murder, and the term of the court expired before they returned their verdict, and the jury separated, it was held the prisoner could not be tried again.

Spier's case, 1 Dev., 491.

The constitutional provision that "no person shall be subject for the same offence to be twice put in *jeopardy* of life or limb" forbids a second trial for the same offence, not only after an acquittal, but also where the jury have been once charged upon a perfect indictment, and were not prevented from returning a verdict by act of God, or at the request of the prisoner.

Idem.

Ohio:

A *nolle prosequi* may be entered in a capital case before a

jury is empanelled; but if a *nol. pros.* is entered after the jury have been charged with the cause without the consent of the defendant, and, the record disclosing no necessity for the discharge, it is held the defendant cannot be put on his trial a second time for the same offence, and that in such case discharge and acquittal are synonymous terms.

Mount *vs.* The State, 14 Ohio, 295.

"To justify holding the accused to a further trial after such discharge," (jury, after long deliberation, being unable to agree, were discharged,) "the record must show that an obstacle, which the law will recognize as a necessity, did in fact exist, and that the order was based thereon, and was the result of consideration and decision; but it need not show all the facts and circumstances which influence the decision, unless made part thereof by bill of exception." The power exercised by the court in such cases is founded upon legal discretion, governed by known rules and fixed principles, and may be reviewed on error.

Dobbins *vs.* The State, 14 Ohio St., 493.

A *nolle prosequi* cannot be legally entered after the jury is sworn, and if a prisoner, without his consent, is discharged from the prosecution, on the pretence of such entry he may plead such discharge in bar of another indictment for the same offence. In some of the States a practice has grown up of entering, by leave of court, a *nolle prosequi* after the jury is sworn, in misdemeanors, but is not followed in others, and in this State the rule will not be extended to cases where the punishment, on conviction, is imprisonment in the penitentiary.

Hurley *vs.* The State, 6 O., 399.

In a criminal cause, the discharge of the jury without the consent of the defendant, after it has been duly empanelled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative. In such

cases the record must show the existence of the necessity which required the discharge of the jury, otherwise the defendant will be exonerated from the liability of further answering the indictment.

Hines *vs.* The State, 24 O. S., 134.

Hines was tried before the court of common pleas of Lucas county, Ohio, February term, 1874, and convicted, on an indictment for receiving and concealing a horse and buggy, knowing them to have been stolen.

Tennessee—Meigs' Digest:

The power to discharge a jury in a criminal case (without the consent of the defendant) without a verdict, is not the exercise of an arbitrary discretion, but an extremely delicate duty, only to be performed in cases of urgent necessity. The causes which create this necessity may be classed under three heads:

1. Where the court is compelled by law to be adjourned before the jury can agree upon a verdict.

2. Where the prisoner by his own misconduct places it out of the power of the jury to investigate his case correctly, thereby obtaining an unfair advantage of the State, or is himself, by the visitation of Providence, prevented from being able to attend to his trial.

3. Where there is no possibility for the jury to agree upon and return a verdict.

Mahalb *vs.* The State, 10 Yer., 537.
Ward *vs.* The State, 1 Hunt, 259.
State *vs.* Brooks, 3 Hum., 72.
Elijah *vs.* The State, 1 Hum., 103.
State *vs.* Connor, 5 Cold., 313.
State *vs.* Curtis, 5 Hum., 603.
Hines *vs.* The State, 8 Hum., 597.
Morgan *vs.* The State, 3 Sneed, 478.
Walton *vs.* The State, 3 Sneed, 689.
Moore *vs.* The State, 3 Heisk., 498.

Texas:

Texas Court of Appeals.

Beed Powell *vs.* The State.

The Court, by express mention, and in unqualified terms, in this case overruled the principles laid down in Mosely *vs.* The State of Texas (33 Texas, 671), and in Taylor *vs.* The State of Texas (35 Texas, 97), in respect to jeopardy.

White, P. J., delivered the opinion of the court; and in referring to the construction given to this clause of the Constitution by Mr. Cooley, already cited by associate counsel in his original brief, says: "Whatever may be the difference of opinion entertained, the decided weight and respectability of authority has uniformly held to the construction given by Mr. Cooley, in his great work on Constitutional Limitations. He also refers approvingly to the principle stated by Bishop, likewise noticed in the brief of associate counsel. He commends the definitions of jeopardy by Bouvier, above cited by us; and adopts the language used by the court in Vestel *vs.* The State (3 Texas, p. 652): "It seems now to be quite as well settled by authority as reason, *that when a party is once placed upon his trial for a public offense involving life or liberty, on a valid indictment, before a competent court, with a competent jury impanelled, sworn, and charged with the cause, he has reached and is placed in jeopardy, from a repetition of which on the same indictment, or any other indictment for the same offense, this constitutional shield forever protects him; and after jeopardy has once so attached, a discharge of the jury, and without the consent of the defendant, before they have rendered a verdict, is equivalent to a verdict of acquittal.*"

The court reversed the judgment below, and dismissed the prosecution.

Chicago Legal News, July 26, 1884, p. 366.

We most earnestly, but respectfully, commend so much of the opinion of the justice as relates to the attempt of the

legislative branch of the State to impair or weaken this constitutional shield, as a lens through which to read the dicta of the court in Murphy *vs.* United States, 1st Curtis' C. C. R., hereafter mentioned more at large.

Virginia:

December Term, 1845. Williams *vs.* The Commonwealth, 2d Grattan, 567.

By the Court: "The question presented for the consideration of the court is, whether the court, in a case of felony, can properly discharge the jury who are sworn in the case without the consent of the accused, merely because the jury cannot agree. We think the courts have not, and ought not to have, such power. No such practice has ever prevailed in Virginia, and, so far as the judges now composing this court are informed, this is the first instance in which it has been done or attempted. In looking to England, we do not find any such power to have been exercised or claimed there. In looking to our sister States, we find the practice has varied. * * In Pennsylvania the judges have denied the power. We incline to the views and reasoning of the courts of Pennsylvania on this important subject."

The court cites the circumstances under which the court would be justified in discharging a jury, namely: Prisoner becoming suddenly ill and unable to attend to his defence; sickness of a juror. In the Tell case the jury were kept together nine days, and the health of one of the jurors suffering materially from long confinement. The court then concludes as follows: "The accused is entitled to be tried by the jury he has selected in the first instance, unless there be some imperious necessity for their discharge."

Pennsylvania:

The supreme court of Pennsylvania held that the inability of a jury to agree did not present such a case of necessity as

would authorize the court to discharge them, and that discharging them for that reason exempted the defendant from liability to subsequent trial.

Weinzorflin *vs.* State, 7 Black., 186.

A prisoner of whom a jury have been discharged *before verdict given*, may plead the circumstances in bar of another trial. He is in *jeopardy*, in the meaning of the Constitution, as soon as he is put on his defence.

Commonwealth *vs.* Clue, 3 R., 501.

IV.

When does jeopardy begin?

Much discussion has been had as to when one charged with a crime may be said to have been put "in jeopardy" in respect to the same. This cannot be said to have been done until he shall have been put upon trial and a jury empanelled to try him. Up to that time the prosecution may *nol. pros.* the proceedings and begin again; but as soon as the jury has been empanelled the prosecution cannot enter a *nol. pros.* without the prisoner's consent; and if it does, and the prisoner is discharged, it has the same effect as a trial and acquittal.

Washburn's Manual of Criminal Law, pp. 195 *et seq.*

The same learned author also says (p. 201): "If the jury be discharged irregularly without sufficient cause the defendant cannot again be tried if he objects;" * * "and the jury is said to be discharged when they have been empanelled and sworn." * * "Wherefore it has been held that when the accused has reached the point of jeopardy, if, without his consent, the jury is unnecessarily discharged before rendering a verdict, it will operate as an acquittal, and he cannot again be put on trial for the same offence." * * "Manifest and urgent necessity seems to be the only

cause that will justify the discharge of the jury without the consent of the defendant before verdict and putting him again on trial."

Each of the foregoing propositions is abundantly supported by numerous authorities.

In a work giving manifest evidence of great and industrious research we find the following conclusion in respect to jeopardy announced:

"A person is once in *jeopardy* when he has been arraigned before a court of competent jurisdiction upon an indictment or information which is so far valid as to be sufficient to sustain a conviction, and he has plead thereto, and all preliminary things of record are ready for the trial, and the jury have been charged with his deliverance."

And we find a very large number of cases cited, and appropriately, in support of the proposition.

We here quote from Tiffany's Criminal Law, Howel's 2d ed., p. 173. The following is to the same effect:

In Iowa "no person shall, after acquittal, be tried for the same offence. *Jeopardy* begins when the jury is sworn. If, after that, without assent of the defendant, the prosecuting attorney enters a *nolle pros.*, or the court, without sufficient cause, discharges the jury, the effect is the same as an acquittal. The defendant is fully discharged and cannot be tried again. The defence of 'once in jeopardy' *is therefore broader than the strict plea of former acquittal.*"

And we remark here that many of the decisions relied upon by the Government show clearly that the judges fell into error either from a disregard of the distinction noted by Harris or from ignorance of its existence.

As the improvident act of the court in discharging a jury, that has been duly empanelled and sworn, is nearly allied to the usurpation of the prosecuting attorney in entering a *nolle pros.* under similar conditions, we submit, for the consideration of the court, a few authorities as to the effect of the act of the latter upon the rights of the prisoner.

The prosecuting attorney has a right, before trial is gone into, under leave of the court, to enter a *nolle prosequi* on an indictment, and such entry is no bar to a subsequent prosecution for the same offence; but after the jury are regularly empanelled and sworn to try the issue, and witnesses are sworn, the attorney general has no right to enter a *nol. pros.*, and an abandonment of the prosecution under such circumstances is equivalent to an acquittal.

U. S. *vs.* Shoemaker, 2d McLean, 114.
U. S. *vs.* Faring, 4 Cranch, C. Ct., 465.
Reynolds *vs.* The State, 3 Ga., 53.
Durham *vs.* The State, 9 Ga., 306.

A *nolle prosequi*, without the consent of the defendant, after the jury is sworn, is equivalent to an acquittal, and may be so pleaded.

United States *vs.* Farring, Cranch, C. Ct., vol. 4, p. 465.

After a jury has been sworn the court will not quash the indictment before verdict without the prisoner's consent.

District of Columbia Circuit Court.
U. S. *vs.* Peacock, 1 Cranch, C. C., 215.

"In the absence of constitutional and statutory provisions the common law furnishes the rule as to the mode of procedure in criminal cases in national courts."

U. S. *vs.* Block, Sawyer, vol. 4, p. 211.

"After indictment found, and until trial commenced, his (the district attorney's) authority may be said to be absolute. He can then abandon the prosecution at his pleasure. He can enter a *nolle prosequi* even without the consent of the court. He can do this before the arraignment of the accused, or he may do it after issue joined. He can do it at any time until the jury is impanelled, and after the trial has commenced he can do it with the consent of the defendant."

Field. J., in United States *vs.* Schawan, (1868,) 10th Circuit, California.
Abbot's U. S. Rep., vol. 2, p. 523.

In view of these cases, we feel authorized to say that the heresy that "the jeopardy of the Constitution" "can be interpreted to mean nothing but the acquittal or conviction of the prisoner, and the judgment of the court thereupon" should find no countenance from an intelligent court, unless presented under the sanction of a decision of the Supreme Court of the United States, if then.

Even in the State of New York, to which Government counsel direct the court for judicial wisdom, it has been held, "Where a juror has been withdrawn, after trial commenced, solely because the public prosecutor, through his neglect, lacks material evidence, it is tantamount to an acquittal."

People *vs.* Barrett, 2d Cal., 304.

Massachusetts:

The courts of this State hold—

"Where the jury, after being long kept together, cannot agree, where it is manifest that they have no reasonable prospect of agreeing, and no means remain but famine or exhaustion to compel them to agree, or where the powers of the court are near terminating by the legal termination of their session, the court, as a power necessarily incident to the due and regular administration of justice, may discharge the jury without the consent of the prisoner and again empanel a jury and put him on trial."

(1832) Com. *vs.* Roby, 12 Pick., 496.

"Where a jury is discharged with the prisoner's consent he may be tried anew."

Mass., 13th Allen, 554.

In Com. *vs.* Roby it was ruled that neither the plea of former conviction or acquittal, nor defendant's objection of having been previously put in jeopardy, would hold: 1. Where the court had no jurisdiction. 2. Where the indict-

ment was so defective that no judgment could be rendered on it. 3. If the trial was interrupted by death or illness of a juror, or by other urgent necessity. 4. If the jury could not agree.

V.

Cases cited by counsel for the Government:

These, for convenience, we will consider as divided into two classes, the first consisting of decisions by the State courts, the second by Federal courts.

We will first discuss those of the first class.

The case of Mosely *vs.* The State (33 Texas, 671) is referred to with great confidence, and yet on examining it we learn that the jury was discharged because of its inability to agree upon a verdict, constituting the imperious necessity that, we admit, will justify the discharge of a jury, even without the consent of the prisoner; and, moreover, the discharge was in this case based upon a statute of that State, as we are informed by the court deciding the case.

The statutory provision (Paschal's Digest, article 3084) that the court may, in its discretion, discharge a jury who have been kept together for such a time as to render it altogether improbable they can agree is not in violation or derogation of the constitutional guaranty protecting persons from being "twice put in jeopardy," &c.

In the body of the decision the court allude to "that dangerous discretion to discharge a jury," and add: "The record shows a careful and prudent exercise of the discretion given him by law," referring to the inferior court.

This case, as we have seen, was subsequently, in Powell *vs.* The State, overruled in express terms.

The case of Hoffman *vs.* The State of Maryland, cited by counsel for the Government, (20th Maryland, p. 433,) when fully understood, presents the strongest possible grounds for the interference of the court to prevent a defeat of justice, and cannot be construed to our injury.

In this case, as in Price *vs.* The State, it was held the trial was not commenced until the jury was sworn. The converse is our position: when the jury was sworn, and before witnesses were called or examined, the trial must be deemed to have commenced, and the jeopardy attaches.

In Hoffman *vs.* The State, the court discharged the jury, and caused the reasons to be spread upon the minutes of the court, namely, that the witnesses for the State had been duly and regularly summoned and recognized, and had been actually in attendance up to the final act of swearing the jury. The court reasonably concluded from these circumstances that there was an evident conspiracy between the defendant and these witnesses to defeat the ends of justice, and under the greatest and most imperious necessity discharged the jury.

Counsel for the Government refer to the case of the People *vs.* Goodwin, 18 Johns. Rep., 187, (Supreme court of New York, August, 1820.)

This case, we likewise find, comes within the principle of imperious necessity. Judge Spencer in deciding the case uses the following language: "Upon full consideration, I am of opinion that, although the power of discharging a jury is a delicate and highly important trust, yet, that it does exist in *cases of extreme and absolute* necessity."

This was not a capital case, and a half an hour before the court would be adjourned by operation of law the jury, in answer to an inquiry of the court, had said, "there was not the least possibility of their agreeing."

The court say, in Commonwealth *vs.* Bowden, Mass. Rep., vol. 9, p. 493 (March Term, 1813): "In the case at bar no alternative was left but of withdrawing a juror, or keeping the whole jury *imprisoned* for an indefinite period." The jury in this case, "after being long out," had reported to the court "that it was not probable they ever could agree." We cannot see how this case, cited also in the brief of counsel

for the Government, can be used successfully against us. It comes within the exceptions before noted.

Counsel for the Government also rely upon the case of the People *vs.* Eliott, 2d Johnson's Cases, p. 301 (supreme court of New York, July, 1801), notwithstanding that it was likewise a case in which the jury were discharged because of their inability to agree upon a verdict: "A and B were indicted for a conspiracy to defraud C; B was acquitted, and the jury being unable to agree in a verdict whether A was guilty or not, the court, against the consent of A, ordered a juror to be withdrawn and the jury discharged."

The dicta of the judges in deciding these cases, lacking the force of adjudications, do not require further notice from us.

The Federal Court Cases.

Before directing the attention of the court to the individual cases, we beg leave to say that we are satisfied that they all fall within the rule laid down in People *vs.* Eliott, above referred to, namely: "Where every reasonable endeavor has been used to obtain a verdict, and the jury cannot, or will not, agree, they must *ex necessitate* be discharged." *Held:* After the jury is sworn in a capital case and the cause has been opened, the court cannot, without the prisoner's consent, discharge a juror at his own request. (Indictment for rape.)

United States *vs.* Negro Randall, 2d Cranch, 412, (Alexandria, May Term, 1823.)

In the foregoing case, after the jury was sworn, and the attorney for the United States had advanced considerably in opening the case, John Morgan, a Quaker, one of the jurors, asked the court to excuse him from serving on the jury in this case, as he could not, consistently with his feelings, serve in a case of life and death.

The court said they could not now excuse the juror without the consent of the prisoner, which was not given, and the juror *not excused.*

After the jury has been out a long time without any probability of agreeing, the court may, in a case of misdemeanor, discharge them without the consent of defendant.

U. S. *vs.* Watkins, 3d Cranch, 443, (Washington, May Term, 1829.)

Where a jury was empanelled and sworn to try an indictment before the defendant had been arraigned or had plead to the indictment, and that jury was dismissed, and, after the defendant had pleaded, a new jury was empanelled and sworn, by whom the indictment was tried, and the defendant was convicted, *held* that the defendant was not twice put in jeopardy by the proceeding. "The prisoner was, in contemplation of law, *coram non judice.* The empanelling of the jury was a mere nullity. (Reference is made to U. S. *vs.* Morris, 1 Curtis, C. C. R., 23.)

5th Blatchford, p. 204, The U. S. *vs.* James Riley.

But suppose that the defendant had pleaded, and the court arbitrarily dismissed the jury, will it be pretended that the case did not come within the prohibition of the Constitution?

We next refer to the case of Watson.

"In this case the trial of the case was adjourned by reason of the sickness of the district attorney and the absence of material witnesses for the Government. On the adjourned day, on motion of the district attorney, and without consent of defendant, a juror was withdrawn and trial postponed." (Nov. Term U. S. Dist. Ct., southern district of New York.) *Held,* "that the proceedings on the former trial were equivalent to an acquittal, and the defendants and their bail entitled to be discharged from all further liability in respect of the indictment."

United States *rs.* Watson, Benedict's Dist. Ct., Rep., vol. 3, p. 1.

We submit, with confidence, that this case deals a powerful blow at the fallacy which forms the basis of the reasoning of counsel for the Government, that there must be an actual verdict to avail the prisoner for his plea in bar, and that the verdict must be one either of acquittal or conviction. And so does Farring *vs.* The United States, 4 Cranch, 465, (May term, 1834,) in which the court held "that a *nolle prosequi* without the consent of the defendant is equivalent to an acquittal, and may be so pleaded." Does not this Court feel bound by this ruling of the old circuit court rather than by the arbitrary decisions of courts of inferior jurisdiction?

The following is the brief history of so much of the case of the United States *vs.* Joseph Haskell and Charles Francis, tried at the October term, 1823, of the Washington circuit court, as concerns our case:

The defendants had been indicted for running away with a vessel, for revolt, &c.

"The jury having been kept together three days and more than twenty-four hours without refreshments, and there being no prospect of their agreeing, and the court being satisfied with the insanity of one of the jurymen, discharged the jury without the consent of the counsel for the prisoner."

We feel that we may admit, without prejudicing the rights of our client in this case, that the court acted abundantly right in so doing and in overruling the plea in bar subsequently interposed on behalf of the prisoner.

It is worthy of notice that Washington, J., in deciding this case, refers approvingly to the following remark of the judge, used in pronouncing the opinion of the court in Commonwealth *vs.* Cook, (6 Serg. & Rawle): "Other times may come when other judges might abuse their discretion."

In the case of United States *vs.* Dickinson, Hempstead, vol. 1, p. 1, (Territory of Arkansas, January, 1820), the court dismissed three jurors, because it was ascertained that they

had not resided twelve months in the Territory, and were therefore wholly incompetent to sit as jurors.

We have only referred to this case because it is one of those referred to in the digests as concerning the question of jeopardy. And, with the permission of the court, we intend to bring to its notice every case tried before either of the Federal courts that in any degree involves this question.

Notwithstanding counsel for the Government seem to rely with great confidence upon the Watson case, we have presented it fully, praying the court to guard itself against certain *dicta* not justified either by the issue or the facts involved. When properly considered, we feel that the principles legitimately settled greatly strengthen our position.

"A court of the United States has authority, in a criminal case, to discharge a jury from giving a verdict whenever, taking all the circumstances into consideretion, there is a manifest necessity for the act, or where the ends of public justice would otherwise be defeated, and it may do this without the consent of the defendant."

"Where, after a jury had been empanelled in a criminal case, the trial was postponed to another day by reason of the illness of the district attorney of the United States, and of the absence of witnesses for the prosecution, and, on the adjourned day, an application was made by the assistant district attorney that the cause go off for the term, on the same grounds as before, and thereupon the court directed a juror to be withdrawn, which was done, and the trial was postponed (the minutes of the court not showing that the defendants consented to this course), and when the indictment was again called, the defendants objected, that such proceedings were equivalent to an acquittal."

"*Held*, that the question must be disposed of as it would have been when the application was made to put the cause off for the term, if the defendants had then expressed their dissent from such a course.

That the minutes of the court must be the guide to the court as to what took place on that motion.

That as it did not appear by the minutes that the illness of the district attorney occurred after the jury was sworn, or that it was impossible for the assistant district attorney to conduct the trial, such illness did not show a manifest necessity for withdrawing a juror.

That as the minutes did not show that the absence of witnesses was first made known to the law officers of the Government after the jury was sworn, or that it occurred under such circumstances as to create a manifest necessity for withdrawing a juror, the position of the case entitled the defendants to a verdict of acquittal when the motion to put off the cause was made.

That the proceedings on the former trial were equivalent to an acquittal, and the defendants and their bail were entitled to be discharged from all further liability in respect to the indictment."

United States *vs.* Watson, (South. Dist. of New York, November Term, 1868,) Benedict, vol. 3, p. 1.

As showing clearly the indisposition of the courts to disturb the integrity of the jury after the oath has been administered, and as evidence that the power of control ceases with the administration of the oath, we quote the language of Justice Cranch in United States *vs.* Watkins, (Washington Circuit Court, May term, 1829,) 3 Cranch, C. Ct. Rep., pp. 579 and 580:

"The court (*nem. con.*) said that, as the juror was sworn, they could not discharge him without the consent of the defendant."

At this point but four jurors had been accepted, and the juror had admitted that he had formed and expressed an opinion on certain of the material facts of the case.

When the panel was complete the district attorney again moved the court to discharge the juror.

Cranch, C. J., said: "That when a *tales* is returned the parties have the right to challenge every one of the original panel who has been formerly sworn in chief, but it must be for a cause arising after he was sworn, not for a cause existing before he was sworn, although it did not come to the knowledge of the party until after he was sworn; and that the court could not *ex mero motu*, or even upon the motion of the counsel for the United States, because the juror had disclosed to the court matter which might be given in evidence on a challenge."

The following is a brief statement of the pertinent facts in case of the United States *vs.* Coolidge, (2d Gallison, p. 365,) 1st circuit, relied upon by Government counsel as the chief support of their claim of arbitrary and irresponsible powers in Federal judges.

A witness for the Government declined to swear, but offered to affirm, (Massachusetts, May term, 1815,) the court, holding that the privilege of affirming was restricted to Quakers, committed the witness for contempt. The trial was suspended, and the case went off upon motion to quash indictment, it having been founded on testimony of witnesses not sworn.

And the startling assumption of power was asserted by Story, J., in deciding the question of suspension. He builded, however, on a legal basis, for he claims the right for the court in order to prevent "a total failure of justice."

In this case, of course, a valid indictment was wanting, and the jeopardy did not arise.

We come to the case of The United States *vs.* Andrew Shoemaker, Illinois, June term, 1840. (McLean's Rep., Vol. 2, p. 114.)

The defendant was indicted for taking letters from the mail. The question involved was chiefly as to the power of the district attorney over the case; and the court properly held that "after the jury are impanelled and witnesses sworn the prosecuting attorney has no right to enter a *nolle*

prosequi, because the evidence is not sufficient to convict. Such an abandonment by the prosecuting attorney is equivalent to a verdict of an acquittal." "A jury sworn in a criminal case may be discharged by the court under any sudden and uncontrollable emergency, and such discharge is no bar, even in a capital case, to another trial."

The principle in the first clause is destructive of the pernicious doctrine transplanted from the modern English courts that no plea in bar can be interposed by the accused until judgment is pronounced upon a verdict of acquittal or conviction.

The doctrine taught in the second paragraph is the equivalent of the "act of God" of the State courts.

The only case decided by the Supreme Court of the United States affecting the question under discussion is that of The United States *vs.* Josef Perez, (1824.)

Wheaton, Vol. 9, p. 579.

Our allusions to this case, heretofore so extensively discussed, will be brief.

"The circumstances stated in the record are: *The jury, being unable to agree*, were discharged by the court from giving any verdict upon the indictment without consent of the prisoner or of the attorney of the United States."

In the certificate prepared under the direction of the Supreme Court we find the recital, "that, under the circumstances stated in the record, Josef Perez is not entitled to be discharged from custody."

Here, again, we find the judges recognizing that imperious necessity that justifies, and alone justifies, the discharge of a jury once duly empanelled and sworn, without the consent of the defendant.

The court, it may fairly be inferred from the language of the decision, required the "circumstances" to be spread upon the record; and, in order to justify the discharge, "a manifest necessity" must appear, "or that the ends of justice

would otherwise be defeated," "that the power has been used with the greatest caution," "for very plain and obvious causes," and "under urgent circumstances." The voluminous record in the present case does not disclose a single one of these essential prerequisites to the exercise of this most dangerous power—this seeming invasion of a constitutional right.

The only remaining case that we deem it necessary to bring to the notice of the court is that of The United States *vs.* Robert Murphy, 1 Curtis C. C., 23.

We assume that the learned justice bringing it to our notice does not claim that it has any effect to rule this case, but refers to it simply as showing that Congress has vested the district courts of the United States with the power of discharging a jury, after it has been duly empanelled and sworn, without the defendant deriving therefrom any right to his plea in bar, at a subsequent trial upon the same indictment. This act was approved August 8, 1846. Section 1038 of the Revised Statutes contains all of this act relating to the question at issue. The court, in the case against Morris, availed itself of the power conferred by this act to discharge the jury, and remit the case to the circuit court. The section reads as follows: "Any district court may, by order entered on its minutes, remit any indictment pending therein to the next session of the circuit court for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the circuit court as if such indictment had been originally found and presented therein."

It will be observed that, although section 1037 permits the district attorney, at his discretion, to remit indictments from the circuit to the district court, and from the district to the circuit court, section 1038 confines this power of certifying a case, the trial of which has been begun, alone to the district court.

We most respectfully submit to the court that this section is not applicable to the courts of the District of Columbia, whose organization differs wholly from that of the other circuit and district courts of the United States. That it was intended in important cases involving "difficult and important questions of law," to give the defendant an opportunity of reaching the Supreme Court of the United States, a reason that cannot apply to this court, either as to its general or special term.

Upon a careful examination of this case of Morris it appears that after the trial began it was discovered that the jury was incompetent to try the cause by reason of the unfitness of one of the members thereof. The district court spread upon its minutes the conclusions required by the statute and the circuit court assumed jurisdiction, and in its opinion likens the exercise of this power to that of the circuit court, under the act of Congress of 1792, c. 66, when the judges of that court differ in opinion. In such an event, at any stage of the case the circuit court may certify it to the Supreme Court of the United States for decision. But it will not be pretended that, after the case has been remitted to the circuit court, that court would have any power under the section applying to the district court, or any right to interrupt the trial of the cause, except in the case provided by the statute, namely, differences of opinion arising between the judges of the circuit court. The criminal term of this court surely derived no power from this statute to deprive the defendant, Bigelow, of his constitutional right not to be put twice in jeopard for the same offence.

We leave this case, confident that this Honorable Court has no disposition to usurp any such arbitrary, unconstitutional, and injurious powers.

We find the following clear summing up of the question "when does the trial begin?" on page 656, vol. 12, p. 657, of the Washington Law Reporter, (October, 1884,) which comes to us with the approval of the late United States district at-

torney, who was counsel for the Government when the indictments in controversy were prepared and presented:

"In a criminal case the trial begins when the jury is charged with the prisoner, and that is at the moment the jury is empanelled and sworn. *The prisoner is not in jeopardy before that time.* The jury remains unorganized as long as less than twelve are sworn, and until it is organized the court may, for good cause, direct the drawing of the jurors to begin anew."

The inevitable corollary from the last of the preceding propositions is that, after organization of the jury, its integrity can neither be destroyed nor disturbed by the court; the rights of the accused having become fixed and unalterable the moment the jury are charged with his deliverance.

We submit that the following maxims are fairly deducible from the foregoing authorities:

1. The Constitution of the United States inhibits the second trial of one who has already been placed in jeopardy for the same offence.

2. At the time the Federal Constitution was adopted, no power existed in the courts of this country, nor in the common law, nor in the courts of England, to discharge a jury duly sworn and empanelled without the prisoner's consent.

3. That it was the duty of the court to order, when requested by the defendant, the consolidation of all the indictments.

4. After the order was made they became one case, and it was beyond the power of the court to recall the privilege from the defendant.

5. That it was the duty of the court, independently of the request of the defendant, to direct the consolidation of all the causes in one cause, and to try them as one cause under the statutes of the United States.

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3. That it was the duty of the court to order, when requested by the defendant, the consolidation of all the indictments.

4. After the order was made they became one case, and it was beyond the power of the court to recall the privilege from the defendant.

5. That it was the duty of the court, independently of the request of the defendant, to direct the consolidation of all the causes in one cause, and to try them as one cause under the statutes of the United States.

6. That jeopardy attached as soon as the jury was empanelled and sworn.

7. That the jury could not thereafter be dismisssed without discharging the defendant finally, in the absence of some one of the judically recognized and established causes, amongst which the convenience of the court is not included.

8. That the protection of our Constitution against second jeopardy is broader than that of former acquittal or conviction of the common law, and does not require actual judgment upon a verdict.

9. That jeopardy attaches at that point in the case when the power of the prosecuting attorney to enter a *nolle prosequi* ceases, to wit, when the jury is empanelled and sworn.

10. Where one is put on trial on a valid indictment before a competent jury, that is, when the jury has been empanelled and sworn, the discharge of the jury without the consent of the defendant is the equivalent of a verdict of acquittal, the presumption of the law in favor of life and liberty being that such a verdict would have been rendered if the case had progressed to a conclusion.

11. The necessity authorizing the discharge of a jury must be a legal one, and does not depend upon the mere discretion of the justice trying the cause, unless exercised according to the known and established rules.

12. The reasons for the discharge of the jury must not only be sufficient, but must appear upon the records of the cause, and are reviewable by the superior court.

13. That this Court, being the court of last resort in criminal cases, is not ruled by the decisions of the circuit courts of the United States, nor even by those of the Supreme Court of the United States.

14. That in every case in the Federal or State courts cited as authority by counsel on either side, in which it appears the defendant was put on trial a second time, we find a great and imperious necessity existed for the discharge of the first jury, equivalent "to the act of God." And, further, that in every such case the position of the defendant was as favorable upon the second as upon the first trial.

15. That Benjamin F. Bigelow having been put on his trial before a jury of the special term of the Supreme Court of the District of Columbia, and such jury having been solemnly charged with his deliverance, and having been fully instructed about all of the charges embraced in the indictments by counsel for the Government, and having thereupon been discharged by the court, not only without his (Bigelow's) consent, but against his earnest protest, and without any necessity known to the law existing therefor, is now entitled to be discharged from the custody of the law, the second trial upon which he is held being in contravention of the Constitution of the United States, and a nullity.

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ROBERT CHRISTY,
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